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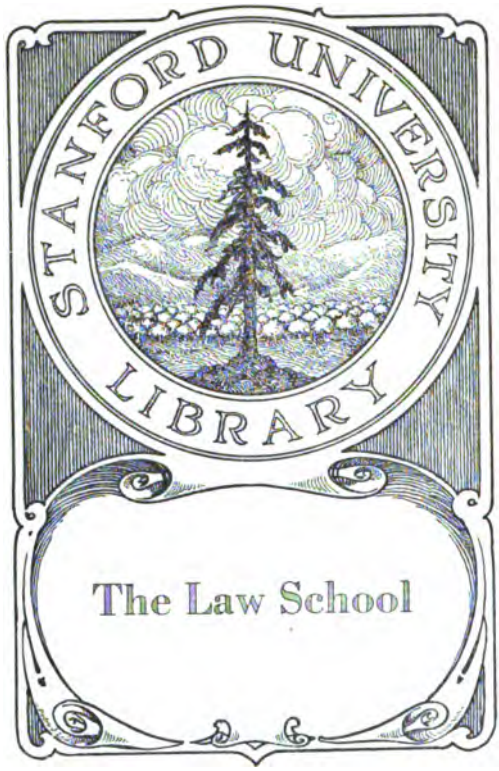
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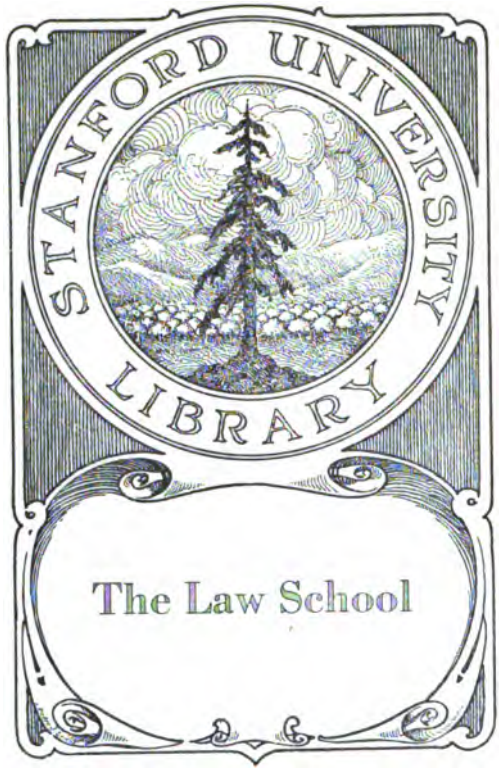
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TREATISE ON THE PRINCIPLES OF PLEADING

IN

CIVIL ACTIONS

UNDER THE

NEW YORK CODE OF PROCEDURE.

A

TREATISE

ON THE

PRINCIPLES OF PLEADING

IN

CIVIL ACTIONS

UNDER THE

NEW YORK CODE OF PROCEDURE.

BY

G. VAN SANTVOORD,
COUNSELLOR AT LAW.

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INTRODUCTION.

In presenting for the favorable consideration of the profession a treatise on the system of pleading in civil actions as modified by the Code of Procedure, a brief explanation of the object and design of the work will not be inappropriate.

The idea of undertaking a task of the kind, presented itself to the author as the suggestion first, of his own immediate wants in the daily practice of the profession; and, second, as a suggestion arising from the wants of that large class who are engaged in a course of elementary study preparatory to entering upon the practice of law. From his own experience, the author was entirely satisfied of the utility and general convenience to the practising lawyer of a treatise exclusively confined to the subject of pleading, and presenting at one view the general features of pleading, under the former practice both at law and in equity, with the modifications and changes effected by the Code, the principles governing the

new system, the rules now applicable thereto, and a reference to, and analysis of, the decision made by the Courts in illustration and explanation of those rules and principles. Such a work, if properly executed, the author was satisfied, from his own wants and experience, might be of much utility, as a book of reference to the profession generally.

Still more so to the law student, might such an elementary work be deemed of use and service as an introductory study to the science of pleading, and as a guide to indicate the extent and nature of the changes made in that science by the Code. There is scarcely a more perplexing subject for one entering upon the study of the law, than that which embraces the system and science of pleading as it now exists, nor one which requires more accurate and careful study to master. Under the old system, as it heretofore prevailed in this State, mingling as it did much of a useless form and frivolous technicality, with much of that substantial logic and sound reason which must always characterize any system so long as legal distinctions are preserved, the study though difficult, was accurate and systematic, and the landmarks of the science clearly and distinctly defined. The authorities had been so carefully collated, and so thoroughly digested, both in the digests themselves, and in elementary works on pleading, that if patience and industry only held out, one was certain in

time to grasp the entire subject. There could be no mistake in the *way* of acquiring this knowledge. The ablest writers on law had treated of, and, perhaps, exhausted the subject. The student could consult, among others, on pleading at law, such writers as Chitty, Gould and Stephen. In Equity, Lubé, Cooper, Mitford and Story. Nor were *precedents*, in every conceivable variety and form, wanted to illustrate the subject, and assist him not only in its acquisition, but in its practical application.

All this is now changed. At the very outset one is embarrassed in selecting the proper course to pursue, or the immediate study to enter upon, in acquiring a practical knowledge of the science of pleading under the Code. The very first provision that meets us at the threshold is, the provision of the code; "all the forms of pleading heretofore existing *are abolished;* and hereafter *the forms of pleading and the rules by which the sufficiency* of the pleadings is to be determined shall be those which are prescribed in this act." Am. Code, § 140.

Under this provision, it would seem as idle to place in the hands of the student, a volume of Chitty, or Stephen, of Cooper or Story, with a view of his obtaining from them alone a knowledge of pleading at law and in equity, as it would be to place in his hands an elementary treatise on *Uses and Trusts*,

with a view of his becoming master of that branch of the law as now Codified by the Revised Statutes.

Nor does the Code itself furnish the desideratum. It *abolishes* but it does not *reconstruct;* it tears down an old system, but it does not build up a new and complete one in its place. It lays the foundation, it is true, simple, broad and strong, but it leaves the edifice to be erected; it sketches, boldly and distinctly the outlines, but does not fill out and complete the picture.

It is not true then, as one on a cursory glance might be led to suppose, that the main *rules* of pleading, founded as they are in sound logic and solid reason, are utterly abolished, though the *forms* may be; nor that the study of the elementary writers above mentioned, and of others who have treated upon this subject, and the authorities which establish, and the decisions which illustrate the principles of pleading under the old system, are to be wholly discarded in acquiring a thorough knowledge of the new.

It is undoubtedly true, that everything technical and formal has been swept away, and that many important changes in other respects have been made by the Code; but much of what was substantial and solid still remains; and it is also true, that a knowledge of the fundamental principles on which the former systems, both at law and in equity, were

based, is still essential to a thorough and practical knowledge of the subject. The main difficulty to the lawyer in his practice is in the adaptation of these principles to the new system. The main difficulty to the student is in determining for himself the proper course of study and investigation—the starting point of inquiry—arising from his ignorance or doubts of the nature and extent of the changes introduced by the Code, and how much of the old and well established theory is still applicable to the new practice.

It is the object and design of the present work, in some humble degree, to supply, partially at least, this want of the profession. The following pages it is hoped will prove of service and utility, not only to the student, as an elementary book, in furnishing to him facilities for, and assisting him in, the right prosecution of his studies in this branch of the law, but to members of the profession generally, as a book of easy reference to established precedents and recognized principles of pleading, both under the former practice and under the Code.

The importance of the subject is such, certainly, as to justify its consideration in the form proposed. The Commissioners of the Code say, they consider the change in pleading to be the key-note of the reforms recommended by them, without which they would despair of effecting any very useful or practical re-

forms. We may regard this, therefore, as the most important, as it is the most radical and extensive of the changes made; and it has, for this reason, been deemed proper to treat it as an entire subject, separate in itself, and distinct from the subject of practice under the Code. Nor is it pretended that in the following pages the subject has been exhausted, or the entire ground fully explored. To do this would lead us far beyond the limits marked out. A full and comprehensive view of the whole subject would require the discussion of principles drawn from almost every branch of the law. In order to frame a pleading correctly under the new system, not only the rules of pleading, properly speaking, but the legal principles involved in the action, and upon which the relief depends, must be thoroughly understood. The forms and precedents, to which, like the bed of Procrustes, under the old system, every cause of action was made readily to conform, are now abandoned. The pleader must state his *facts;* and the facts must be such, and such only, as constitute a single good cause of action. The question that meets him on the threshold is, What facts constitute a good cause of action? and, without the aid of any form or precedent to guide him, this question must be satisfactorily answered before he can safely take the first step in pleading. It is evident, therefore, that the science of pleading comprises something more than a mere

system of rules respecting the mode and manner of making allegation in a cause.

Most members of the profession will no doubt agree that it requires a better lawyer to frame the pleadings correctly under the Code, than under the old system.

Take one of the most simple and familiar cases—that of an action of trover, at common law. Almost every variety of case in trover might be properly adapted to the old form, namely,—that the plaintiff A, was possessed, as if his own property, of a certain chattel which he casually *lost*, and which afterwards came into B's hands by *finding*. But, the said B, (although often requested) has not returned the same, but has converted it to his own use, &c. No request was, perhaps, ever made, and no loss or finding was necessary to be proved, and yet the pleading was theoretically good; and the plaintiff was allowed to show any state of facts to prove that the defendant had converted, or sold, or destroyed, or was exercising unlawful dominion over the property. Under the new practice, the facts alone must be stated. A demand is not necessary to be averred except when necessary also to be proved, or rather when the facts in the complaint show that such demand must be proved to sustain the action. In what cases, therefore, it may be asked, is a demand necessary to be alleged in an action which would have been formerly trover,

or in an action to recover personal property? This question, often a nice and difficult question of law, it will be seen, must be first satisfactorily solved before the pleading can be correctly drawn; for no general form of pleading can meet every variety of case, particularly where it may be desirable to verify it by the oath of the party.

A full consideration, therefore, of the subject of the science of pleading might be said to embrace the discussion of the principles of law on which the action is grounded, and which determine the kind and measure of relief.

The present Treatise, of course, attempts no such wide range, and to accomplish no such ambitious design. It professes merely to consider and discuss the new principles of pleading (as distinct from practice) adopted by the Code, and to refer to, and comment upon, the adjudicated decisions thereon; and also to compare these principles and decisions with the established principles and adjudicated cases before the Code. It professes also to consider and note the changes effected by the Code, and to discuss and point out the rules which now exist, to test the sufficiency of the pleadings; to apply these rules in detail to the various pleadings on the part of either party—the complaint, the answer, the reply, the demurrer—and to compare the nature, object, and use, as well as the mode and manner of allegation, of each

of these pleadings, with its corresponding pleading under the former law or equity system; and finally to consider the effect of the pleadings, and the rules for the construction thereof under the Code, together with some question of a practical nature connected therewith. This will be found in the main to comprise the entire scope of the work. It is, of course, from the nature of the subject, and the changes made by the Code, essentially different from any former treatise on pleading; and from its generality, embracing as it does the subject of pleading, both at law and in equity, must be in many other respects far from complete.

It is believed, however, to present a full and correct view of the main features of the new system; together with such of the former general rules of pleading, as are applicable to that system, and as do not conflict with the provisions of the Code and the adjudicated cases thereon.

The propriety of accompanying the volume with a collection of improved precedents of pleading, adapted to the text, and drawn in conformity with the principles there laid down, has been suggested, and at first recommended itself to the judgment of the author; but on reflection the design was abandoned. Pleading, as we have seen, is a matter of substance and not of form, under the Code. It does not rest upon technical rules and formulas, but upon those

broader legal principles which determine the right of action, the measure and kind of relief, and the nature of the evidence which sustains it. Every right of action, involving, as it does, different legal principles, and being based upon different facts and circumstances, may require a different form of statement; and no collection of precedents, however extensive it might be, would be sufficient to furnish a form for every kind of remedy sought in our courts. Under the Code, precedents are, in general, to be invented, and cannot in all cases be prepared beforehand for use. The pleader is required to understand the legal principles on which his action is based, the evidence necessary to support it, the general rules of pleading, and make his forms for himself. It is not, however, meant by this, that a collection of approved precedents of pleading, under the Code, might not be of considerable utility, not only in practice, but also in illustration of the principles discussed in the text. On the contrary, the author has no doubt such a collection, if carefully and correctly made, would be useful and serviceable, and might moreover tend to establish a uniformity in the language of an ordinary pleading, which would certainly be desirable to counsel, and tend to facilitate business in court.

Should the wants of the profession require, and the approval of the present work justify, such a col-

lection of precedents and forms of pleading, it can be readily supplied hereafter.

The references to the reported decisions cited in the work will be found to include most, if not all the adjudicated cases published since the Code went into effect, bearing upon the subject under discussion, or calculated to illustrate it. These references are brought down to, and include the recently published decisions contained in the following reports: IV. Comstock, Court of Appeals. X. Barbour, Supreme Court Reports. IV. Sandford, Superior Court. VI. Howard, Practice Court, and Vol. I, new series of the Code Reporter.

NEW YORK, *September* 1*st*, 1852.

CHAPTER I.

OF PLEADING IN GENERAL.

PLEADING, in general, signified at common law, the allegations of parties to suits when they are put into a proper legal form. It was in strictness no more than setting forth that fact, which, in law, showed the justice of the demand made by the plaintiff, or the discharge and defence made by the defendant.[1]

In Equity, also, pleading signified nothing more than the written allegations of the respective parties, containing the facts of the case (in a due legal form) on which the one party founded his title to relief, or the equitable aid of the Court, and the other his discharge and defence.[2]

In the present chapter, treating of the general nature of pleading under the former, as well as under our present, system, the subject will be considered in the following order:

1. Origin and history of Pleading.
2. Pleading as it existed before the Code.
3. General changes effected by the Code.
4. Of the rules to determine the sufficiency of Pleadings under the Code.

[1] Bacon Abr. Title Pleading. [2] Story Eq. Pl. § 4.

SECTION I.

ORIGIN AND HISTORY OF PLEADING.

THE system known by the name of pleading is of remote antiquity. Mr. Stephen, in a note to his Treatise on Pleading,[1] traces the origin and meaning of the word *plea*. He thinks it of Norman origin, derived perhaps from the Roman *placitum*, the name applied to the rescripts of the Emperors, and the judicial decisions of the Roman empire. It was anciently used to signify suit or action; but within the meaning of the later English law is taken in its more restricted sense of *making allegation in a cause*.

The pleadings in equity, it is said, were probably borrowed from the civil law, or from the canon law, (which is a derivative from the civil law) or from both. Hence, at almost every step there may be traced coincidences between the pleadings and practice in Chancery, and the pleadings and practice in a Roman suit and in an Ecclesiastical suit.[2]

These two modes of pleading, however, from the earliest period were kept separate and distinct, and still are to this day in England, and most of the States in the Union, where the common law and equity are administered, if not in different tribunals, yet under different forms of proceeding. The Code

[1] Note 1, Appendix.

[2] Story Eq. Pl. § 14, and see note to this section, tracing an outline of the proceedings in suits under the civil and canon law.

of Procedure of New York attempts to unite and blend them together.

Anciently, the appearance of the parties in court in actions at law, was an actual appearance, and the pleading was an *oral altercation* in open court, in presence of the judges. This mode was in use in the reign of Henry III., and written pleadings, it is supposed, were not introduced till about the middle of the reign of Edward III.[1]

It was the office of the judge to superintend this oral contention, and to compel the pleaders so to manage their alternate allegations, as at length to arrive at some specific *point or matter affirmed on the one side and denied on the other*. This result being attained, the parties were said to be at ISSUE. If the issue proved to be one of law, it fell to the judges to decide; if of fact, the parties referred it to one of the various modes of trial then practised, or to such trial as the court should think proper.[2]

The change of *oral* pleading in open court for that of written statements, led to no departure from the ancient style of allegation. The pleadings ever since continued to be framed upon the same principles and to pursue the same forms as when they were oral.

Pleading is said to have been first methodically formed, and cultivated into a science, in the reign of Edward I. From that time the judges began to prescribe and enforce certain rules of statements, of which some had been established at periods considerably more remote, and others apparently were then, from time to time, first introduced.[3] A modern writer

[1] 3 Reeves, 95. [2] Steph. Pl. 24. [3] Steph. on Pl., 123.

thinks the science was in a state of progressive advance till the reigns of Henry VI. and Edward IV.; when it was "cultivated with so much industry and skill, that it was raised to a sudden perfection in the course of a few years."[1] But Lord Coke, and Sir M. Hale, refer to the reign of Edward III. as the period when pleading had attained its highest point of excellence. The latter complains that the judges and pleaders had become "somewhat too curious, and that the science had degenerated from its primitive simplicity." The "trivial niceties" and prolixity of which he complains, are abuses that continued to exist till long after his day, and though in modern times much checked and discouraged, were never entirely extirpated.[2]

Pleadings being thus modified, from time to time, by the application of a variety of arbitrary and technical rules, were gradually moulded and refined through the course of centuries, into that system of special pleading, peculiar to the English common law, form which our own system was derived.

It was a feature of this system that every cause of action had its appropriate form of remedy, and each form its rules peculiar to itself. The origin of these different forms of action is a curious portion of the history of English jurisprudence, and it may not be uninteresting or unprofitable here, briefly to notice this branch of the subject, as it will serve in some degree to account for and explain the difference which existed from the earliest periods between the pleadings and practice at law and in equity.

[1] 3 Reeves, 424. [2] Appendix to Steph. Pl. Note 35.

It has been well observed that in strictness, there were not and could not be distinct systems of law and of equity. They were more properly, distinct systems of pleading and practice.[1] Both originally issued from the same source, and were based upon the same laws. Thus, actions at law, in the earliest ages of English jurisprudence, and before the system which we now call equity was established, were commenced by the issuing of what was afterwards known as *original writs*, technically termed *brevia*.[2] These writs were issued on the petition and application of the suitors out of Chancery. The Chancellor, deriving his power from the Crown, as the head and fountain of justice, administered legal redress in all cases. On the application of a suitor, the Chancellor, instead of administering the relief himself, issued an *original writ* under the great seal, in the King's name, directed to the Sheriff of the county where the injury was alleged to have been committed, containing a summary statement of the cause of complaint, and requiring the party to do justice, or to appear before some of the king's judges or courts, to whom the writ was directed, and who were authorized by it to determine the controversy between the parties. Thus, the writ was in substance a commission from Chancery to an inferior tribunal, to hear and determine the claim, instead of its being heard in the first instance by the Chancellor himself. It was regarded as essential to the due institution of the suit, and as giving

[1] See Const. Debates, pp. 441, 2 and 3. Argus Ed.

[2] Their use may be traced as far back as the time of Henry II., and they are generally supposed to have been of Norman extraction.

jurisdiction to the Court in which the defendant was directed to appear. These writs were conceived in fixed and certain forms, and differed from each other according to the nature of the injury they were designed to redress. In the course of time they came to have the effect of limiting and defining the right of action itself, so that no cases were considered within the scope of judicial remedy, but those to which the language of some known writ was found to apply.[1] It was soon found, however, that cases of injury arose, for the redress of which no known precedent, *or form of action*, could be found; accordingly a statute was passed in the reign of Edward I., authorizing the clerks of Chancery to issue new writs as occasion might require; under this statute many writs were issued, which being analogous to writs of *trespass*, were denominated *trespass on the case*.

It was supposed at one time there were fifty-nine of these different *original writs*, or forms of actions, in use. They were, however, much reduced in number, from time to time. At the adoption of the Code, in this state, there were but ten forms of personal actions. No new writ had been invented for the last three hundred years.[2]

It was, however, found difficult or impossible to invent different forms of action, sufficient to afford the appropriate remedy for every case which might arise. Though remedies and forms of action had been provided to enable suitors to recover money demands, or specific chattels, or lands, yet there were none to

[1] Steph. on Pl. 8. Burr, Pr. 10.

[2] See Report, Com. Code, 139.

enable them to restrain a party from the commission of a wrong, to enforce the specific execution of a contract, or obtain other specific relief. The exigencies of society soon rendered this necessary, and the remedy was accordingly provided. When the suitor came with his petition to the Court of Chancery for specific, or, as it is now called, equitable relief, and found no appropriate writ or form of action whereby to obtain it, the Chancellor, instead of devising a new writ and sending him with it to the Courts of Law, to obtain redress under that form, heard the petition and administered the relief in person. This was the origin of Equity Jurisprudence. It is to be particularly observed that no argument can be drawn from the origin of the two systems in favor of an *inherent difference* between legal and equitable relief. There is no reason why in the earlier ages of English jurisprudence a *writ* should not have been furnished to a suitor, providing him with a form of action at law to restrain the commission of an injury or to enforce a specific contract, as well as to recover chattels or real estate. In such case, these actions now classed as *equitable*, would have been *legal*, and governed and controlled by legal forms as much as the action of replevin or ejectment.

The different forms of pleading adapted to the two classes of cases, grew out of this practice of administering relief in two distinct tribunals. The pleadings at common law, as we have seen, were moulded into a system in the courts of law, and were, as has been well expressed, "the necessary growth and consequence of the gradual refinement of English jurisprudence through a succession of centuries." The

allegations of the parties, as we have also seen, different from the practice of the civil law, were originally oral; and the judges applied their own rules and invented their own forms of pleading to attain the specific object in view, namely, the production of an *issue*.

In Chancery, however, the forms of the civil law obtained. The early Chancellors being either ecclesiastics or statesmen, were many of them bred up in the jurisprudence of the civil and canon law, and it was natural for them in the administration of their judicial functions in the Court of Chancery, to transfer into that Court the modes of proceeding with which they were most familiar.[1] Finding the modes of proceeding at law, limited and restrained by a system of rules so arbitrary and inflexible as to render those modes inadequate to afford relief in a large class of cases, in which, by the common law of England, relief ought properly to be granted, they disregarded those modes and forms, and threw off entirely the restraints which confined and limited the proceedings in actions at law. They adopted no particular form of action; they departed entirely from the system of special pleading. The suitor simply presented his petition or complaint, answering to the *libel* of the civil law; briefly stating in writing the facts of the case, the claim he sought to enforce, or the injury of which he complained, and asked the relief he desired. And the court, if he proved his case and showed himself entitled to that relief, administered it to him at once. The pleadings

[1] Story Eq. Pl. § 14.

in this early period of equity jurisprudence, were of great simplicity and brevity. The cases in which resort was had to equity were as yet few, and the facts of no great complexity or difficulty of detail.[1]

Nor was there anything either in the nature of the controversy, or the relief prayed for, which rendered a different mode of practice and pleading necessary in law and in equity. It was merely the result of circumstances. Thus, for example, if instead of issuing the *original writ* in the first instance in an action of *assumpsit* or *debt*, the Chancellor had heard the case and administered the relief himself, according to the forms and mode of procedure of the civil law, there never would have grown up in England two such systems as those of law and equity. An action to recover damages on a bond or a promissory note might have been sustained, as well in the form of a suit in equity, as in a suit at law. The plaintiff's allegation, or statement of demand, might as well have been made in the form of a bill of complaint, as in that of a declaration. But this was prevented by the inflexible rule adopted at the commencement, that if the party could obtain relief in any known form of action in the courts of law, he could not claim it directly from the Chancellor in equity. Similar consequences would have resulted, had the Chancellor declined to determine any controversy between suitors, and sent them indiscriminately, by the invention of new writs and new forms of action, to the courts. A uniform system of pleading and proceeding, would doubtless then have characterized all judi-

[1] Story Eq. Pl. § 11.

cial proceedings, and we should have found existing in our day the very thing at which the code aims, and which is said to be so difficult, if not impossible to obtain under the common and statute law of the land, namely, the abolition of the distinction between *legal* and *equitable relief*, as well as between *legal* and *equitable remedies*.

Such is the origin of the difference between the pleadings and proceedings in Chancery, and those in actions at law. This difference became still more striking as the two systems grew up gradually side by side together. We have already noticed what the pleadings at law became. In Chancery, as the court attained more extensive jurisdiction and exercised more diversified powers, new modes of pleading were from time to time adopted, fitted for its own peculiar purposes, and the pleading and practice in Chancery soon grew into a distinct and independent system. What the pleadings in equity finally became, and what they were in this State, and in other States of the Union[1] under the old system which we inherited from England, is well expressed by Judge Story in his Commentary on Equity Pleading.

It has become, he says, "A science of great complexity and a very refined species of logic, which it requires great talents to master in all its various distinctions and subtle contrivances, and to apply it with sound discretion and judgment to all the diversities of professional practice. The ability to understand what is the appropriate remedy and relief for

[1] Except Louisiana, where the Chancery or civil law forms are used in all cases.

the case; to shape the bill fully, accurately, and neatly, without deforming it by loose and immaterial allegations, or loading it with superfluous details, and to decide who are the proper and necessary parties to the suit:—the ability to do all this requires various talents, long experience, vast learning, and a clearness and acuteness of perception which belong only to very gifted minds."

SECTION II.

OF PLEADING AS IT EXISTED BEFORE THE CODE.

THE origin of pleading, at law as well as in equity, was noticed in the last section. In the present section it is proposed briefly to consider the distinguishing features, and the different modes of allegation which characterized the two systems.

It has been observed, that in equity there were no particular *forms* of action in use. The complainant stated his case and prayed for his relief, and if the case was proper for the relief demanded, and it appeared that the common law courts had no jurisdiction, the relief was granted.

In suits at law, there were different kinds of civil actions. Actions were generally divided into three

classes, *real*, *personal*, and *mixed*.[1] Personal actions were divided into actions *ex contractu*, and actions *ex delicto*. Actions *ex contractu* were principally *assumpsit*, *covenant*, *debt*, and *detinue*; those *ex delicto*, *case*, *trover*, *replevin*, and *trespass*.[2]

The action of detinue was abolished in this State by statute,[3] and its place supplied by replevin. Two other forms of action *ex contractu* might also be added to the above, namely, *account* and *annuity*. The former, though given by statute in certain cases,[4] was not often used, and the latter had become entirely obsolete. It was essential that some one of these forms of action should be selected by the plaintiff, who sought a legal redress for an injury to his personal rights; and it was, at common law, essential too, that he should select the proper form of action; otherwise, he must fail. In equity, the suitor was relieved of this embarrassment, but he sometimes encountered another nearly as great, namely, in determining whether the relief he asked was not such as might be obtained in some one of these forms of action at law. If he had an adequate remedy at law, he was turned out of a court of equity.

General course of Pleading in an Action at Law.

Having determined in a court of law the form of the action to be prosecuted, the next step, on the appearance of the parties in court, was their various statements or allegations, termed the *pleadings*.

These were, 1. The Declaration. 2. The Plea. 3.

[1] Chit. Pl. [2] Chit. Pl. 97. [3] 2 R. S. 639, § 15.
[4] 2 R. S. 34, § 9, id. 176, § 2. 3 Hill, 59.

The Replication. 4. The Rejoinder. 5. The Surrejoinder. 6. The Rebutter, and 7. The Surrebutter. There was also the Demurrer, which was a pleading in the nature of an objection to the other pleadings as a matter of law, and might be pleaded by either party, and at any stage of the proceedings.

The first pleading on the part of the plaintiff was the *declaration*, which was a statement in writing of his cause of action in legal form. This declaration, as every other pleading in the cause, was required to be framed agreeably to the established rules and forms of pleading, (which we do not intend now to notice,) and if defective in any particular, either in substance or form, might be objected to as insufficient in law by *demurrer*, on the part of the defendant. Or, if the defendant did not demur, he might deny the declaration to be true in point of fact; or, if it could not be so denied, he might allege some new matter in abatement, or suspension of the action, or in contradiction to the plaintiff's declaration, or in avoidance of it. Such answer, *in fact*, on the part of the defendant was technically denominated his *plea*. To the defence thus made, the plaintiff might again in his turn, *reply*, either—in case of a demurrer, by reasserting his declaration to be sufficient in law to support his action, and referring that question to the judgment of the court, which was termed a *joinder in demurrer;* or, in case of a special plea, he might on his part demur to such plea, as insufficient in law to constitute a defence, or he might deny it to be true in point of fact, or allege some new matter in contradiction to it, or in evasion of it, according to circumstances; such answer, *in fact*, being styled a

replication. To the replication, the defendant might either *demur* upon the law, or oppose a rejoinder as to the fact; and to the rejoinder, the plaintiff might demur, or oppose a *surrejoinder;* and so the parties might continue to proceed, by a system of alternate *allegation* and *objection*, *denial*, or *evasion*, technically termed the pleadings, until they arrived at an issue,[1] that is, some specific point of law, or fact, affirmed on one side and denied on the other, and presenting the exact question for the court to determine.[2]

In Equity. The course of pleading in a suit in equity was entirely different.

The complainant exhibited to the court his bill of complaint. This answered to the declaration in a suit at common law, or to the *libel* of the civil and canon law. It is true, bills were of various kinds, as bills of Interpleader; bills of Certiorari; bills praying the decree or order of the court touching some right claimed by the party exhibiting the bill, or some wrong done in violation of the plaintiff's rights. Also, bills to perpetuate the testimony of witnesses, and bills of discovery,—all of which were termed *original bills.*[3] Also, a variety of bills *not original*, as a bill of Revivor; a bill of Review; a bill to impeach a decree on the ground of fraud, &c. But though they were of various kinds, there was only one form of bill. It was addressed to the court, contained the names and descriptions of the persons ex-

[1] See post, chap. viii. sec. 1.

[2] The above general description of the course of pleading in an action is taken from Mr. Burrill's Treatise on Practice, vol. i., pp. 80, 81.

[3] Story Eq. Pl. § 10, 18 and 19.

hibiting it, a narrative of the facts and circumstances of the plaintiff's case, and of the wrong or grievance of which he complained, and the names of the persons by whom done, and against whom redress was sought, with a prayer for the particular relief demanded, and for process to compel the defendants to appear and answer. The bill, also, usually contained various other parts, such as the *charging part;* the *interrogatory* part; the *jurisdiction* clause, &c., which it is not necessary here to notice.[1]

If any ground of defence was apparent on the face of the bill itself, either from the matter contained in it, or from defect in its frame, or in the case made by it, the defendant, might, as in an action at law, take advantage of the defect by *demurrer*. If the objection was not apparent on the face of the bill, then it must be particularly pointed out to the court, either by plea or answer.

A plea was proper when the matter was such as would reduce the case to a single point; as, where the objection was to the jurisdiction of the court, or, for the want of proper parties.[2]

If, however, the defendant did not demur or plead to the complaint, he then put in his answer, by which he either confessed and avoided, or traversed and denied the several parts of the bill, or admitting the case made by it, submitted to the judgment of the court upon the bill, or upon a new case made upon the answer, or both.[3]

[1] See Story Eq. Pl. § 26 to 48.

[2] 1 Barb. Ch. Pr. 114, 115.

[3] Id. 130. A demurrer was not proper to an answer in Equity.

The last pleading was the *replication* of the complainant to the defendant's plea or answer. It was nothing more than a general averment of the truth, and sufficiency of the bill, and a denial of the allegations in the answer. Its office was merely the production of an issue.[1] The cause was then in readiness for the taking of proofs, which were usually taken out of court, and the cause subsequently brought to a hearing upon the pleadings and proofs thus taken.

Such were the general features of the two systems of pleading at law and in equity. The Code, which has swept them both away, has adopted in place of them, a system substantially similar to the mode of procedure heretofore practised in Equity and derived from the Civil Law. The change effected by the Code of procedure, in pleadings, constitutes, however, another and a distinct branch of the subject, and will be discussed in the next section.

SECTION III.

GENERAL CHANGES EFFECTED BY THE CODE.

THE first and perhaps the most radical and sweeping change effected by the Code, upon the pleadings in civil actions, is in abolishing the distinction which existed between actions at law, and suits in equity.

[1] 1 Barb. Ch. Pr. 249.

Prior to the passage of the Code, as we have noticed in the preceding section, the pleadings, as well as the forms of proceeding in a suit at law, were entirely dissimilar from those of a suit in equity. Each court had its distinct and separate system of procedure as each had its distinct jurisdiction.

In the mode of pleading, especially, in these courts, there was a wide distinction. The very object of the pleadings seemed to be different, and the rules which determined their sufficiency totally unlike. In an action at law, the object of the pleader was by a formal statement of facts, or of those legal fictions which the formality of the common law permitted, and even required, to frame a *single*, *material*, and *certain issue* either of law or of fact; that is, some specific point or matter, affirmed on one side, and denied on the other.[1] Hence the rule, that facts themselves must be stated, and not the evidence of facts, and the further rule which prohibited the parties in their pleadings from stating more than one matter constituting a sufficient ground of action in respect to the same demand or a sufficient defence to the same claim. The same count in the declaration could not contain two promises in respect to the same subject matter, nor could the defendant, in the same plea, rely upon or set up several distinct defences.[2]

The object of pleading in Equity, and the rules applicable thereto, were entirely dissimilar. One of the main provinces of a Court of Equity was to enforce a discovery of evidence in aid of the relief sought. Hence, in Equity, the plaintiff was permitted

[1] Steph. on Plead. 24 [2] Chit. Pl. 226.

to state his whole case, as well the facts, as any circumstances tending to prove and establish the facts, with a minuteness of detail, and an informality, entirely incompatible with the precision required by the rules of pleading at law. The Code has abolished these distinctions in pleading and the forms of proceeding. It has gone, or at least pretended to go, further. It has abolished the distinction, not merely between legal and equitable *forms*, but between legal and equitable *remedies*. This great and radical change, the abolition of the distinction between actions at law, and suits in equity, *and* of the form of such actions and suits, is the foundation of the system introduced by the Code. The section abolishing the distinction between actions at law and suits in equity is as follows:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, and there shall be in this State, hereafter, but one form of action, for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a Civil Action."[1]

The language of this section, if literally construed, would seem to be not only to destroy the distinction existing in the modes of obtaining relief, which characterized the proceedings in courts of law and of equity, and to blend the two separate jurisdictions into one; but to change the very nature of those distinct remedies which were formerly sought in the

[1] Am. Code, § 69.

separate tribunals. The remarks of the Commissioners upon this subject, seem to strengthen this view of the question. Its chief object, they say, is to declare the leading principles which lie at the foundation of the whole proposed system of legal procedure, and without which very few, if any, essential reforms can be effected in remedial law.[1]

The judicial decisions, however, that have been made upon this section, seem to give it a more limited and restricted meaning. In Hill *v.* McCarty,[2] JUSTICE MASON held that a distinction was still recognized between legal and equitable causes of actions, at least as far as the mode of trial was concerned, though the Code had abolished the distinction between law and equity, so far as the form of the action and jurisdiction of the court were concerned, and so far as the mode of commencing suits and the forms of pleadings are concerned. JUSTICE BARCULO, at the Dutchess special term in the same year, held that the Code which had abolished the *forms* of actions, had retained the *principles* which govern them.[3] The Superior Court of New York, at General term, in the case of Linden *v.* Hepburn,[4] laid down more fully and distinctly the doctrine, that although the Code had abolished the distinction between legal and equitable *remedies*, it had not changed the inherent difference between legal and equitable *relief*. JUSTICE SANDFORD, in delivering the opinion of the court in that

[1] See First Rep. Com. of the Code. See also the Preamble to the Code.

[2] 3 C. R., 49, at Madison, Special term, June 1850.

[3] McMaster *v.* Booth. 4 How. Pr. R. 427.

[4] 3 Sand. 668. 5 How. 188.

case, says: "We imagine a much broader effect has been claimed for the abolition of the distinction between legal and equitable remedies, than was ever intended by the legislature. The first section of the Code shows what was intended by the word remedies. It is limited to actions and special proceedings, and the declared object of the preamble to the Code, is simply to abolish the distinction between legal and equitable actions. There is no ground for supposing that there was any design to abolish the distinction between the modes of relief known to the law as legal and equitable, or to substitute the one for the other, in any case."

In this case it was held that where the plaintiff demanded a judgment of forfeiture of a lease for breach of conditions, and to be put in possession of the premises, he had no right to an injunction in the same action to restrain the defendant from making alterations in the building, &c., in violation of the covenants in the lease, the former being equivalent to an ejectment at law, and the latter being purely equitable relief, and the one being totally inconsistent with the other. But the court permitted the injunction to stand on the stipulation of the plaintiff not to take judgment for the forfeiture, or delivery of possession of the premises; with liberty to amend the complaint so as to ask for damages.

In the same court it was held,[1] that, notwithstanding the abolition of the distinction between the forms of actions at law and suits in equity, yet, that even in the pleadings, or the manner of stating the facts constituting the plaintiff's cause of action, a distinc-

[1] Howard *v.* Tiffeny, 3 Sand. 695.

tion was still properly to be made between the statement of a matter requiring purely a legal remedy and one which heretofore would have been classed as equitable. While in the former case it is necessary to state only the facts constituting a cause of action, substantially (without regard to form) in the same manner as in a declaration, yet in the latter case, it is often necessary to state in the complaint, facts which will bear upon the granting of costs, or of the particular relief demanded as formerly stated in an equity pleading.

The Supreme Court of the second district, in the case of Alger *v.* Scoville, and others,[1] laid down the rule that the Code does not contemplate the union of a cause of action triable by the court, with one triable by a jury; or in other words, that a legal and equitable claim for relief could not be properly joined in the same action, as for example, a claim arising on a contract with a cause of action against a defendant as assignee.[2]

It was denied in Otis *v.* Sill,[3] that the principles of law and equity are to be administered in the same action, and that a complaint may demand both legal and equitable relief; or, that to a complaint setting up a legal claim, a purely equitable defence may be interposed.

A similar decision was made in Crary *v.* Good-

[1] 6 How. P. R. 131.

[2] But see § 167 Am. Code, as applicable to this case, and affecting the decision therein; and see post, chap. iii., Joinder of Actions.

[3] At the St. Lawrence General Term, 8 Barb. S. C. R. 201.

man;[1] wherein it was held, that an equitable right in a defendant to a conveyance of land, is not a defence to an action for the possession, any more than it was before the code was adopted. JUSTICE SILL, who delivered the opinion of the court in that case, says, "I can perceive nothing in this language indicating any design to dispense with equitable actions, in cases in which they have been previously required to defend or enforce a party's rights. On the contrary, the continuance of controversies distinguished as *legal* and *equitable* is contemplated in terms, and the object avowed is to provide a *mode of proceeding*, which may be used in both." A similar rule was applied in Cochran *v.* Webb, by the Superior Court of New York.[2]

The doctrine in these cases, however, that an equitable defence cannot be set up in the answer to an action purely legal, as for example, in an action to recover real property,[3] was regarded by JUSTICE SELDEN, in Wooden *v.* Waffle,[4] as settled to the contrary;[5] though he also held in that case, that the answer could not go beyond a defence, and insert facts with a view to *affirmative relief*. Whatever doubts remained on this subject, however, are now settled by sections 150 and 274, of the Amended Code,[6] the former of which provides that the defend-

[1] 9 Barb. S. C. R. 657, at the Cattaraugus General Term, Feb. 1851.

[2] 4 Sand. 653.

[3] See also Hill *v.* M'Carthy, maintaining the same principle, 3, C. R. 48.

[4] 6 How. Pr. R. 153.

[5] See also Averill *v.* Taylor, 5 How. Pr. R. 476, per Cady, J.

[6] Amendment of 1852.

ant may set forth a legal or equitable defence, or both, to the plaintiff's cause of action, and the latter of which allows the defendant "Any affirmative relief to which he may be entitled." And see further on this subject, *post*, chap. v. sec. 3, under the head *Equitable defence to legal cause of action.*

In the case of Wooden *v.* Waffle,[1] Mr. JUSTICE SELDEN, in an elaborate opinion upon the nature of the changes introduced into the pleadings under the code (and which will be more fully noticed in its proper place), lays down the rule in relation to the construction of section 69 of the Amended Code, as follows:—That the Constitution itself establishes a distinction between law and equity. And that the Legislature did not intend to blend the mode of proceeding at law and in equity, any farther than was compatible with both jurisdictions. One of the conclusions at which he arrived in that case was, that equity jurisdiction was retained and exercised upon the same principles, and to the same extent as heretofore,—the mode of trial being the same, and the relief being adapted to the circumstances of the case. And, therefore, the statement of facts in the complaint should be in conformity with the nature of the action, and the relief sought. While the Legislature intended to blend the mode of proceeding at law and in equity, it did not intend to, and could not, abrogate distinctions which are inherent in the nature of things. These conclusions are similar to the positions taken by the same Justice in the case of Rochester

[1] At the Munroe Special Term, Oct. 1851, 6 How. Pr. R. 193.

Bank *v.* Suydam and others,[1] wherein, on a motion to strike out a portion of the complaint, it was held that the kind of relief afforded by equity imperatively required a different mode of stating the case from that adopted in the common law courts, and that the code does not attempt to abolish the distinction between law and equity, even if the Legislature had the power to do so under the Constitution.[2]

The opinions of the learned JUSTICE in the two cases above cited, have been dissented from by JUSTICE HARRIS, in the case of Williams *v.* Hayes.[3] Alluding to the case of the Rochester City Bank *v.* Suydam, he says: "It was not the intention of the Legislature, in adopting the Code, to continue the distinction between common law and equity pleadings. On the contrary, it was intended that there should be but one system of pleadings. It was not intended that the rules of common law pleadings should be applicable to one class of cases, and those of chancery to another. On the contrary it was intended, that neither the rules of common law pleading nor those of equity pleading, should be exclusively applicable to any case of pleading under the Code. In every case the criterion to judge of the sufficiency or insufficiency of the pleading is the same."

This view seems to be directly sanctioned by the Court of Appeals in the late case of Giles *v.* Lyon;[4]

[1] 5 How. 216. See also Anonymous Case, 1 C. R. 49. Knowles *v.* Gee, 8 Barb. S. C. R. 300. Merrifield *v.* Cooley, 4 How. Pr. R. 272. Hoyt *v.* Dearborn, 2 C. R. 17.

[2] Const. Art. 6, § 3 and 5.

[3] 5 How. Pr. R. 471. Rensselaer Special Term, June, 1851.

[4] 4 Coms. 600.

in which, alluding to the section under consideration, and also to the preamble to the code,[1] that Court, per Gardiner J., says: "The Legislature, by the section above quoted, sought to accomplish the object indicated in the preamble, by *abolishing the formal distinction between law and equity.* They were to be blended, and formed into a single system, which should combine the principles peculiar to each, and be administered thereafter, through the same forms and under the same appellation."

The case of Millikin *v.* Cary and others,[2] was an action to set aside an assignment made to hinder and defraud creditors. The complaint contained, in addition to the allegation of facts, a detail of circumstances, confessions of defendant, &c., constituting *evidence* to establish charges of fraud and insolvency of assignee. Mr. JUSTICE SILL held the complaint to be bad. Alluding to § 69 of the Code, he remarks: "To allow a mode of pleading in suits of equitable cognizance different from that required in suits at law, would frustrate the obvious design of this legislation. It would be in conflict with its plain provisions, and perpetuate, at least in part, the very mischiefs at which it was specially aimed. The intention of the Legislature manifestly was, to permit a party

[1] The preamble is as follows:

"Whereas, it is expedient that the present forms of actions and pleadings in cases at common law should be abolished, that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceeding, in all cases, should be established."

[2] 5 How. Pr. R. 272.

to state the facts of his case in his complaint as they exist, without imposing upon him the responsibility of determining in advance, whether relief should be administered to him according to the rules of legal or equitable jurisprudence."

While, however, fully recognizing the abolition of all distinction in the pleadings between causes of action, legal and equitable, and thus agreeing with the opinion of JUSTICE HARRIS in Williams *v.* Hayes, that one uniform system of pleading is made applicable to both classes of cases, he yet recognizes the doctrine as fully as laid down by JUSTICE SELDEN, in Wooden *v.* Waffle, that "there are actions of legal and of equitable cognizance, between which, as heretofore, the Constitution and laws recognize a distinction."

Mr. JUSTICE PARKER takes a view of the question similar to the last three cases cited. In Getty *v.* Hudson River Railroad Company,[1] on a motion to set aside an amended complaint because of the union of claims for relief both legal and equitable, he says: "We have certainly made but little progress in the reform that has been attempted if law and equity can now only be administered in separate actions. If such is held to be the present rule of practice, the very object of having law and equity administered in the same tribunal and in the same forms of proceedings will be defeated. It was formerly considered a great evil that in a suit at law the plaintiff could be turned out of court, on the ground that his relief was in chancery, and that where a bill

[1] 6 How. P. R. 269, Special Term.

was filed in the court of chancery, it might be dismissed on the ground that the complainant had an ample remedy at law. The evil is still just as great as it was formerly, if a party can have only legal or equitable relief in the same action. In such case, if he commences his action asking for equitable relief, as for instance a specific performance, and it turns out that he is not entitled to it, but only to legal relief, by way of damages, he might perhaps, if such strictness is to govern, be put to a new action to obtain redress. This certainly ought not to be; and such a strictness is hostile to the whole spirit of the change that has been made."

These views seem to be entirely in accordance with those of the Commissioners of the Code, as will appear by reference to their remarks explanatory of the nature and object of the section under discussion. Their design undoubtedly was to abolish all distinction between equitable and legal actions, not only as to the form of pleadings, but even as to the entire mode of proceeding, including the trial and judgment. In respect to the pleadings, they say: "We propose to reduce the system of pleading to one of *allegation* merely, without reference to discovery, in the mode which will presently be suggested, so that the same form of allegation may be adapted to cases which have heretofore been distinguished as legal and equitable." And in abolishing that mode of pleading which enabled a party in equity to obtain a discovery of facts, or the evidence of facts in aid of a prosecution or defence, they have provided another way to attain precisely the same thing. They also, it seems,

contemplated a uniform mode of trial.[1] So also as to the form of the judgment and the means of enforcing it. "It is a leading feature," they say, "of our proposed plan, to require, in all cases, a *judgment adapted to the established rights of the parties;* and we can see no difficulty in incorporating into it, as a portion of an *uniform system of practice*, a form of execution which shall adapt itself to the judgment."

The several opinions and decisions above cited, though in some respects apparently conflicting, may, in their main features, be reconciled by a careful comparison, and by applying to them the late amendments introduced by the Code. Thus, for example, the case last cited, Getty *v.* Hudson River Railroad Company, holding that claims for legal and equitable relief may be united in one action, seems to be at variance with the decisions in Alger *v.* Scoville,[2] Crary *v.* Goodman,[3] and Otis *v.* Sill,[4] in the Supreme Court, as well as in Linden *v.* Hepburn, in the Superior Court of New York.[5] The difference, however, in the rule laid down in the first and the last cases, is rather apparent than real. In Linden *v.* Hepburn, the court do not hold that legal and equitable claims, if consistent with the general nature of the relief sought, may not be united. But the decision of the case is put upon the express ground that the relief asked, namely, a forfeiture of the lease for breach of conditions, and an injunction to restrain defendant from violating conditions—is *inconsistent*. In the

[1] See post, chap. viii. sec. 2.

[2] 6 How. P. R. 131. [3] 9 Barb. 651.

[4] 8 Id. 102. [5] 3 Sand. 668.

same case it is held that although the "inherent difference between legal and equitable relief," is not changed by the Code, yet that the proper relief, whether legal or equitable, will be administered in the same form of action. "In some cases," says the court, "alternative relief may be prayed, and relief be granted, in one or the other form in which cases an action at law was necessary before to attain the one form, and a bill in equity to reach the other. A suit for specific performance is one of that description. But we think *inconsistent relief* can be no more asked now than it could under the old system."

The rule laid down by JUSTICE PARKER in Getty *v.* Hudson River Railroad Company, does not differ in substance. The claims for both legal and equitable relief, which may be united in the same action, are only those which are not *inconsistent*. Indeed the decision in Linden *v.* Hepburn is cited with approbation in the opinion delivered in that case, and the rule intended to be laid down is manifestly the same.

If it be urged that these decisions are at variance with those of the Supreme Court, in Alger *v.* Scoville, and Otis *v.* Sill, cited supra, it will be sufficient to say that, however this may be, the question decided in those cases has ceased to be of much practical importance. Whatever may have been the doubts of the court, whether legal and equitable causes of action may be united, the Legislature by the late amendment to the Code has set the matter at rest by declaring expressly in general terms:

§. 167. The plaintiff may unite in the same complaint several causes of action, whether they be such

as have been heretofore denominated *legal or equitable, or both*, where they all rise out of,

1. The same transaction or transactions, connected with the same subject of action, &c., &c.

This section, as thus amended, it is conceived, does not change the rule laid down in Linden *v.* Hepburn, and Getty *v.* the Hudson River Railroad Company; but while it allows a party to seek legal or equitable relief, or both, at the same time in the same action, it does not permit him to seek, or allow the court to give, judgment for two or more distinct kinds of relief that are inconsistent with, or repugnant to, each other.

From these various decisions, and the sections above quoted, the following propositions in respect to the general changes effected by the Code in pleading in civil actions, may be laid down:—

That while the inherent difference between legal and equitable relief remains unchanged by the Code, the remedy in both classes of cases is the same.

There is no such thing as an action at law, as distinguished from a suit or proceeding in equity. The jurisdiction is merged in the same tribunal.

The Code provides a uniform system of pleading,[1] mode of trial,[2] form of judgment, and execution.

Legal and equitable relief may be sought in the same action, and may be claimed in the alternative, and the court will grant such judgment as the party may show himself entitled to from the facts estab-

[1] See next section of this chapter.

[2] See post, chap. viii. sec. 2.

lished, whether compensatory in damages, or for specific relief, or both.

But if both species of relief are claimed, they must not be repugnant to, or inconsistent with, each other, but must be such as may be embraced in the same judgment, as a claim for damages for breach of a contract, or an injury to property, with a claim for a specific performance of the same contract, or specific relief in respect to the injury complained of.

The forms of action are abolished, but their substance and the principles which govern them are preserved.

As to the manner of stating the facts in a pleading, and whether a different mode of "allegation" is allowable according to the different species of relief sought: that is, whether a party is to be held to the same strictness of statement in setting out his case for specific relief, as for an injunction, a specific performance and the like, that he would be on a claim merely for compensation in damages, these are questions upon which it must be confessed the decisions are not entirely uniform. As this subject, however, will be more fully considered when we come to speak of the particular pleadings in an action, it will be unnecessary further to discuss it here.

SECTION IV.

OF THE RULES TO DETERMINE THE SUFFICIENCY OF THE PLEADINGS.

UNDER the old system this was one of the most important branches of the subject of pleadings. At common law a system of rules was applicable to every description of pleading in courts of law; many of them highly artificial and technical. The subject, in all its bearings, formed one of the most difficult and abstruse branches of the study of law. The books are full of the subtlest distinctions, and the most curious refinements of logic, in the application of these artificial rules to the science of pleading. Many of them, indeed, perhaps, most of them, are based upon reason and sound sense, and have their foundation in the very nature of legal remedies. But, on the other hand, many of them are the merest refinement of technicality, dealing with fictions, rather than truth, applicable to the form, and not to the substance of the pleading. Under the application of these rules the science of pleading became an abstruse, artificial, and formal science. Books and treatises innumerable were written to explain and illustrate it; and although the Legislature, from time to time, made several important modifications tending to simplify the pleadings in actions at law, yet, down to the time of the adoption of the Code, it may be stated, that form and not substance was the distinguishing feature of the system.

A different system of pleadings grew up in the Courts of Equity, regulated by different principles, and governed by different rules, but at the same time *rules*, which if less subtle and technical, were no less formal, precise, and unbending.

It is the object of this section to ascertain what, if any, of these rules are still remaining; what are their force and effect; and what their applicability to our present system, and how under that system is the sufficiency of the pleadings to be determined and ascertained.

The Commissioners of the Code, in their explanatory remarks, say, that the change in the mode of pleading is the key of the reform proposed by the Code. Without it, they should despair of any substantial and permanent improvement in modes of legal controversy.[1]

Accordingly, in the section submitted by them and adopted by the Legislature, they abolished entirely all forms of pleading, legal and equitable, then existing, and at one blow overturned the whole system of pleading, as then understood and practised, in the Courts of Law and Equity.

The section is as follows:—

"All the forms of pleading, heretofore existing, are abolished; and hereafter the forms of pleading in Civil Actions, and the rules by which the sufficiency of the pleadings is to be determined, shall be those which are prescribed in this act."[2]

[1] First Report of Com. p. 137. [2] Am. Code, § 140.

In the amendments made at the next session of the Legislature, 1849; this section was modified as follows:—

"All the forms of pleading heretofore existing, *inconsistent with the provisions of this act*, are abolished; and hereafter, the forms of pleadings in civil actions in Courts of Record, and the rules by which the sufficiency of the pleadings is to be determined, are *modified as* prescribed by this act."

The Legislature of 1852 restored the section substantially as it originally stood, by striking out the words above, in italics, and inserting the word, "those" in place of the words "modified as."

Under this section of the Code, as it originally stood, and as amended, a variety of decisions have been made which will be briefly noticed. In the first place, however, it may be well to inquire generally the object and effect of the amendments to the section under consideration, made by the Legislature as above noticed.

In the section as originally passed all *forms* of pleading were abolished, and the *rules* by which the sufficiency of the pleadings were to be determined, were declared to be those prescribed by the Code. The design of the amendment of the Legislature of 1849, seems to have been to limit the operation of this section; and instead of a general annihilation of all forms and precedents, and a repudiation of all former rules of pleading, to retain so many of those settled rules and principles as did not conflict with the Code. The rules to test the sufficiency of pleading were de-

clared to be *modified* as prescribed by the act. Only such forms of pleading as were *inconsistent with the provisions of the act* were declared abolished. The language of the section, as thus amended, is too plain for misconstruction. It left the whole of the old theory and science of pleading, not repugnant to the Code, in existence; and made the well settled rules and established principles of pleading applicable in substance, without regard to form, to the new theory established by the Code. But the practical question which now arises is, Did the Legislature, by repealing this amendment, and restoring the section to where it originally stood, mean to establish a contrary rule? In other words, did it mean to declare that no *form of pleading*, which had heretofore been in use, should be hereafter used or deemed sufficient, and that no *rule of pleading* should be deemed applicable to the new system?

It would seem, from a careful consideration of this section, that such could not have been the intention of the Legislature. Indeed, if we descend to a verbal criticism, it may be said that the amendment of 1849 did not essentially change the meaning of the section from what it was before. The original section simply abolished the *forms* of pleading, and the amendment added, "inconsistent with the provisions of this act." Now, the Code throughout clearly and manifestly abolishes every thing like form in pleadings, independent of the section under consideration. All mere "forms" of pleadings are inconsistent with the act, and in that sense there was no necessity to limit it. The original section (and as it now stands) cannot cer-

tainly mean that if a plaintiff chooses to state his case in the simple form allowed by the old system of pleadings in an action for assault to the person, or trespass for carrying away goods, that for that reason alone the pleading is bad and may be demurred to for insufficiency. The first clause of the section, as it now stands, as well as with the former amendment, is nothing more than an abolition of the *forms* of pleading, doing away with the necessity of any technical or fictitious statements, and leaving the party to adopt such a mode of allegation as may be adapted to his cause of action, whether that mode be logically such as the old system established or not.

The same may be remarked in respect to the second clause of the section. It cannot be said that the Legislature meant to abrogate all rules to test the sufficiency of pleadings except those prescribed in the act. The act itself does not pretend to furnish rules to determine in all cases what shall be a sufficient "statement of the facts constituting a cause of action or defence." This must still rest upon those well established general rules and principles of pleading which existed at common law, and are precisely as applicable to the new system of pleading under the Code, (except where modified and abrogated in terms), as are the settled and established common law principles which govern estates applicable to that subject, except where in terms modified by the revised statutes.[1]

If any other doctrine than this were established it,

[1] Knowles *v.* Gee, 8 Barb. S. C. R. 300. Fry *v.* Bennett, 1 C. R., N. S. 249, 250.

would lead to endless contradiction and confusion. Thus for example, it is laid down as a general rule of pleading under the old system, that it is not necessary to allege what the law will presume;[1] as in an action for slander imputing theft, the plaintiff need not aver that he is not a thief, because the law presumes his innocence till the contrary be proved. It will not certainly be pretended that the Code, in abolishing the old rules of pleading, has made it necessary in such an action for the plaintiff to aver that he is not a thief. So, too, it was not necessary to allege matters of which the Court *ex-officio* takes notice, as for example, to set forth a public statute; nor to allege circumstances necessarily implied; as if the plaintiff plead that he is heir to A, to allege that A is dead.[2] The abolition of forms of action, and rules of pleading, does not affect these general principles of the common law, and, although the Code prescribes nothing in their place, they are manifestly, from necessity, as applicable to pleadings now as formerly. The conclusion at which we arrive is, that the late amendment of this section, by the Legislature, restoring it to where it originally stood, has not essentially altered its signification from what it was made by the amendment of 1849.

The adjudged cases upon this section of the Code seem to be entirely in accordance with this view of the question. In Boyce *v.* Brown,[3] decided at a General Term in the 4th district, the pleadings were

[1] Steph. on Pl. 353.

[2] Steph. on Pl. 353. 2 Saund. 305.

[3] 7 Barb. S. C. R. 81.

under the original Code. The court, in that case, recognizes not only the old definitions of pleading, but the pre-existing rules, except where abrogated in terms by the Code. JUSTICE HAND, in delivering the opinion of the court in that case, says: "The forms before in use are not, in some respects, 'legal forms,' particularly as to the classification of actions; but the manner of stating the claim or defence, as required by the Code, with this exception, and that of certain formal parts, still remains; and in other respects I have not been able to discover that any great change has been made in the substance of pleading. The pleader may use his own language, but the necessary matter must be there, and be stated in an intelligible and issuable form, capable of trial. Facts must still be set forth according to their legal effect and operation, and not the mere evidence of those facts, nor arguments, nor inferences, nor matter of law only." In the same opinion, the court also recognizes the existence and applicability to the present system of those well settled rules, that pleadings should not be hypothetical, nor argumentative, nor in the alternative, nor destitute of truth and certainty.

In the case of the Rochester City Bank *v.* Suydam and others,[1] JUSTICE SELDEN lays down the rule still more definitely, and holds expressly that all pre-existing rules of pleading, both at law and in equity, which are not expressly abrogated by the Code, and which can properly be made applicable to the new system of pleadings, are still in force.[2]

[1] 5 How. P. R. 216.

[2] See also opinion of same Justice in Knowles *v.* Gee, 8 Barb. S. C. R. 300. And see McMaster *v.* Booth, 4, How. Pr. R. 427.

This was a case in which the plaintiff claimed, what under the old system would have been *equitable* relief, to wit, to reach certain securities in the hands of the defendant, and to be subrogated to his rights in respect to them. In testing the sufficiency of the pleadings in that case, the court applied the rules which governed equity pleadings, and refused to strike out certain statements alleged to be redundant, on the ground that they embraced matter of evidence merely. This is, doubtless, going farther than the majority of the judges have yet gone, and, indeed, the same learned Justice in a later case[1] seems to have modified his opinion in one respect, namely: That mere *matters of evidence* cannot be inserted even in a complaint claiming purely equitable relief, although the rules to determine the sufficiency of the pleading in these cases in all other respects not inconsistent with the express provisions of the Code, were still the old rules of equity pleading.

In the well considered opinion of the Superior Court, at General Term, in the case of Fry *v.* Bennett,[2] DUER, J., says: "The Code, in abolishing a division of actions that was in a measure merely arbitrary, and all forms of pleading inconsistent with its own provisions, has been careful not to abolish those rules of a sound logic, by which the sufficiency of pleadings is to be determined. Rules which were purely technical, and had a reference solely to the

[1] Wooden *v.* Waffle, 6 How. 146, Munroe Special Term, Oct. 1851.

[2] 1 C. R. N. S. 249.

particular form of the action in which they were applied are doubtless abolished; but those which, having their foundation in reason and good sense, are an important aid in the investigation of truth, and manifestly tend to the furtherance of justice, retain all their original force and authority."

The conclusion at which we arrive on this point, cannot be more clearly or better expressed than in the language of a late decision by JUSTICE HARRIS;[1] "The principles of pleading, whatever the system, are always the same. Its office is to present the cause of action on one side, and a defence on the other. This is not less true under our present system, than under the former. Names are changed —useless forms and technical rules are abolished— but *the principles remain unchanged.*"[2]

Are the same rules applicable in pleading a cause of action or defence which is purely legal, and one which heretofore would have been classed as equitable?

This question has assumed some importance from its frequent discussion, and also from an apparent conflict of decisions in respect to it. Mr. JUSTICE SELDEN, in the cases above cited, holds the negative of this question.[3] The views expressed by him in these cases seem, in the main, to accord with the principle recognized in the cases (referred to in the preceding section) of Linden *v.* Hepburn,[4] and Howard *v.* Tiffeny[5] in the Superior Court of New York—particularly the latter case. A similar doctrine seems to be countenanced in a decision of

[1] Buddington *v.* Davis, 6 How. Pr. R. 402.

[2] And see post, chap. viii. sec. v.

[3] See ante, pages 58 & 59.

[4] 3 Sand. 668.

[5] 3 Sand. 695.

the Supreme Court of the 1st district, at General Term, in the case of Coit *v.* Coit.[1] MITCHELL, Justice, in that case says: "The Code expressly declares that it is expedient that the present forms of *action* and pleadings in cases *at common law* should be abolished, but uses no such language as to forms of action and pleadings in equity (see recital at beginning of Code).[2] Section 140 only abolishes the forms of pleading heretofore existing, so far as they are inconsistent with the Code, and modifies the forms of pleading as prescribed by that act. So far therefore as the equity form of pleading is not inconsistent with the Code, it does not seem to be repealed. Section 469 abrogates the former rules and practice of the Courts so far as they are inconsistent with that act; but expressly provides that where they are consistent with that act they shall continue in force, subject to the power of the courts *to relax, modify, or alter the same.*" If these positions are henceforth to become the settled practice of our courts, we then arrive at the conclusion that we still have, if not two different systems of pleading, at least two different sets of rules to determine the sufficiency of pleadings in different actions.

It seems to be entirely settled and assented to on all hands, as is truly remarked by Justice Selden in Wooden *v.* Waffle, that in a purely *legal* action under the Code—(that is an action claiming compensation

[1] 6 How. P. R. 53.

[2] But it does say also that it is expedient that the distinction between legal and equitable remedies should no longer continue and that an uniform course of proceeding in all cases should be established.

in damages, or to recover specific, real, or personal property)—the common law rule which confined the allegations of fact in every pleading to such as were *essential* to the cause of action or defence, and which if put in issue would be *decisive* of the suit, is still in force, and that whatever is inserted beyond these essential facts, in such an action, will be stricken out on motion. It seems to be also settled that even in a pleading for specific relief—or what formerly would have been called an equity pleading—the old equity rule that the pleader might insert matters of evidence, or any collateral matter the admission of which might be material in establishing the allegations in a pleading,[1] is now abolished. In other words, that a pleading under the Code cannot be used for the purpose of *examining* the opposite party; and that whenever any such collateral matters are introduced for that purpose, or other matters of evidence merely, they will be struck out on motion. What then is the point of difference which still remains? It is, whether the same strictness of allegation in stating "facts" is required in an action for equitable as for purely legal relief. Whether the same rules govern the two modes of pleading, and whether nothing can be properly inserted in the one which cannot stand the uniform and infallible *test* administered to the other.

Perhaps the discussion of the question is not a profitable one, and can lead to no practical results. Indeed, the distinction between the two classes of cases cited may be found, after all, to lie in words rather

[1] Hawley v. Woolverton. 5 Paige, 522.

than in things—in form, and not in substance. In Williams *v.* Hayes,[1] JUSTICE HARRIS, in sustaining the theory of a uniformity of pleadings, lays down very clearly, and as we think very correctly, the doctrine that under the Code neither the rules by which the sufficiency or insufficiency of pleadings in the common law courts, nor those which were applicable to pleadings in courts of equitable jurisdiction, can be adopted as a sure guide." By this we do not understand him to mean that the established principles of pleading at common law so far as the substance of the issue was concerned, without regard to form, were to be disregarded, or that those general rules which tested the sufficiency of the pleadings both at law and in equity, were of no farther utility under the new system. All that we understand by this is that one class of rules is not to be used as an infallible guide in determining the sufficiency of the pleadings in one species of action, and another class in another. The Code abolishes the distinction between legal and equitable remedies, and provides a uniformity of pleading as well as of proceeding, in all cases. Or, as he very intelligibly expresses it elsewhere in the same opinion: "It was intended that neither the rules of common law pleading nor those of equity pleading, should be *exclusively applicable* to any case of pleading under the Code. In every case the criterion by which to judge of the sufficiency or insufficiency of the pleading is the same."

This "criterion" is defined by the same learned judge to be "whether the allegation can be made the

[1] 5 How. Pr. R. 471.

subject of a *material issue*." Perhaps such a criterion may be the proper one in both classes of cases if the words *material issue* are to be understood, not as a single issue *decisive of the whole case*, but as an issue *material to the relief sought to be established in the action*. For example, in an action for damages for a trespass, the issue was narrowed down to a single material point, which, if admitted or proved, was *decisive* of the whole action. In a suit for a specific performance, or for an injunction, the particular relief demanded might rest upon a variety of facts and circumstances, one of which if denied or disproved, was not entirely decisive against the party claiming, and yet such a fact might be, or might become in the failure of proof of other allegations, a material fact to entitle the party to the particular relief sought—and therefore properly set forth in the pleading. While, therefore, it may not be too much to say, that, although the Code provides for and requires an entire uniformity in the mode of pleading, as well as of proceeding in all cases, and while the same general rules may be applied to test the sufficiency of pleadings, yet that the statement of facts in a pleading is to be made in accordance with the particular kind of relief demanded. This was manifestly the intention of the framers of the Code. They propose, they say,[1] "to reduce the system of pleading to one of *allegation* merely, without reference to discovery, so that the same *form of allegation may be adapted to cases which have heretofore been distinguished as legal and equitable*."

Under the old practice in Chancery, a bill of com-

[1] First Rep. of Comrs. 75.

plaint might have a twofold object, discovery and relief. A bill for discovery and relief, in addition to the grounds for relief, might state matters of evidence which were material in establishing the main charge, or in determining the nature and extent of the relief.[1] But a bill merely for relief should contain allegations of fact, entitling the party to it *substantially in the same form as averments in an action at law.*[2] This was the old rule of equity pleadings. The pleadings should consist of allegations of facts, stated with as much brevity and precision as possible, not of inference or argument.[3] In the Mechanics' Bank *v.* Levy, above cited, the Chancellor says: "The allegations in the bill, so far as the question of the complainant's right to the relief is concerned, are substantially in the same form as the averments in a declaration at law, and the pleader must state his client's cause of action in such a manner that the main facts upon which his right to relief depends *may be put in issue and tried.*"—So much in respect to the question of *relief;* but the complainant was also entitled to a *discovery*, and accordingly under the old equity system, he might, to quote from the same opinion, "state any matters of evidence in his bill which may be material in establishing the main charge, or in ascertaining the nature or kind of relief proper to be administered, and may interrogate the defendant as to these matters."

The discovery is now abolished by the Code. The pleading can no longer be used as a method of examination, or to obtain evidence in aid of the relief

[1] Mechanics' Bank *v.* Levy, 3. Paige 606. [2] Ib.
[3] Hood *v.* Newman, 4 John. Ch. 437.

sought. Nothing is left of the old equity mode of pleadings, but the simple allegations of facts material to the relief sought, and which go to establish the plaintiff's case; and whether these facts were one or more, they were required, as we have seen, even under the old equity system, to be set forth substantially the same as averments at law, and were required to be such as might be "*put in issue and tried.*"

Apply this rule to pleadings under the Code, and it will reconcile the differences of opinion that have existed in respect to pleadings in cases of legal and of equitable relief. It will, perhaps, establish a uniform system and one set of rules for all cases of pleading. Instead of the test that the allegation can be made the subject of a "material," or as it is elsewhere said, a "decisive issue," apply the equity rule of pleading, that the pleader must state such facts, and such only, as are material to the particular relief he claims, and as may be properly "*put in issue and tried.*" These facts, of course, will vary with the nature of the cause of action. The statement of the case in an action for the partition of land, or for the foreclosure of a mortgage, must, of necessity, be as different from that of an action for a trespass, or on a simple contract, as the judgment in the one is different from the judgment in the other. The prayer for relief is different, and the very nature of such relief is dissimilar; and yet the Code provides one form of judgment in all cases "which shall specify clearly the relief granted, or other determination of the action:" and a uniform mode of enforcing such judgment by its appropriate kind of execution. I am, therefore, unable to perceive anything in the Code which authorizes

or warrants the application of different rules in determining the sufficiency of the pleadings in different actions.

Nor does the case of Howard *v.* Tiffeny[1] conflict with these views. In that case, which was an action for a perpetual injunction in respect to the use of demised premises for a violation of the conditions of the lease, the court refused to strike out certain allegations of fact upon which, in the aggregate, the plaintiff rested his right to the particular relief demanded. It was very properly said in respect to such actions, in that case: "The facts constituting the cause of action spoken of in the Code, are, therefore, not merely the facts upon which the plaintiff's *right to ask relief* is founded, but those words include all such facts as are necessary to found the *particular relief* demanded, and to enable the court to give the proper judgment in the action. The evidence in support of such facts is, of course, an entirely different thing." But there is nothing in the opinion to authorize the inference that facts may be alleged, even in such a pleading, which are not "material" to the specific relief sought, or facts which cannot properly be "put in issue and tried." Nor is it to be inferred that the same rule is not equally applicable to every class of actions.

In the case last cited, a perpetual injunction was the particular relief demanded; and the facts showing the right to the injunction were therefore material allegations. But if the injunction be only asked provisionally, and not as a part of the general relief,

[1] 3 Sand. 695.

in the action, the facts going to show the right to the injunction cannot be set out in the complaint for the purpose of enabling the plaintiff to move for such injunction.[1]

What was said by the court in Minor *v.* Terry,[2] is strongly corroborative of the theory that a uniformity of pleading in all cases is not only practicable, but has been actually established by the Code. After remarking that what the Code intended to abolish was merely the *action for discovery* in aid of the prosecution of another action, the court says: "It should not be forgotten that a complaint in equity, in some of its important aspects, bears a close analogy to a declaration in the old action on the case. In that action the plaintiff was accustomed to set out the facts of his case, entitling him to relief, particularly, and at large, as may be seen by consulting the precedents in *Chitty's Pleading* in actions on the case for torts to the person, to personal property, and to real property. It may be sufficient to refer to the declarations in actions of slander and libel where special damages are claimed. The pleader cannot content himself by stating the legal conclusion that the defendant uttered actionable words against him whereby he sustained damages. But he must set out the *particular words* and in many cases the *particular circumstances* under which they were uttered; and when special damage is claimed, the *particular way* and *manner by which* the loss or damage occurred. Under the present system, since the forms of action are abolished, *every action is one upon the case;* that

[1] 2 C. R. 64. 3 id. 250. [2] 6 How. Pr. R. 208, per GRIDLEY.

is, founded on the particular facts of the case set forth in the complaint. So, in a complaint in equity in most cases where an injunction is prayed for, it is competent to set out the facts which constitute the foundation of the right with particularity and minuteness."

Applying these principles, and keeping in view these distinctions, namely, first, that the *action for discovery* is abolished, and that the pleadings under the Code cannot be used in any shape for that purpose; and second, that there never was in reality any essential difference in the mode of stating an action on the case at law, and the facts going to establish a right to relief in equity, and the theory of a perfect uniformity of pleading, and of the rules to test the sufficiency thereof, is at once established.

That such was the intention of the commissioners of the Code, is, I think, clearly apparent. The argument which is urged against the practicability of attaining this result, based upon the *inherent difference* between legal and equitable relief, the different forms of judgment, and the different modes of trial required for the two classes of cases, has been already sufficiently answered by what was said in the first section of this chapter relative to the origin of equitable remedies, and of the different forms and modes of pleading at law and in equity.

As to how far the Code has effected a uniformity of trial of issues of fact in all cases, see post, chap. viii. sec. 2.

CHAPTER II.

OF THE PARTIES TO AN ACTION.

It is well said that there are no rules connected with the science and practice of pleading more important than those which relate to the *persons* who should be the *parties to an action.* The remark was equally true of pleadings in equity as of pleadings in actions at law. One of the most difficult matters in framing a bill in Chancery was often found to consist in determining who should, and who should not, be the parties; notwithstanding, courts of equity were never tied down by the narrow and artificial rules applicable to actions at law. It cannot be reasonably expected, therefore, that this difficulty is entirely surmounted by the Code; or that under its provisions there is really more certainty in determining who should be proper parties to an action than heretofore in Chancery pleading; for the Code has adopted, with slight modifications, the rule in relation to parties which has heretofore obtained in courts of equity.[1]

The Code has made a radical and fundamental change in the practice in one respect. It found the

[1] Per Mason, J. 5 How. Pr. R. 100.

rules respecting parties to actions as widely different in actions at law and suits in equity, as the pleadings and proceedings were. The direct and immediate parties having a legal interest, and they only, could be required to be made parties in a suit at law. But courts of equity frequently required all persons who had remote and future interests, or equitable interests only, or who would be directly affected by the decree, to be made parties; and the court would not, if such persons were within the jurisdiction, and capable of being made parties, proceed to decide the cause without them. Persons having very different, and even opposite interests, were often made parties defendant, the general rule being that all persons were to be made parties who were either *legally or equitably interested in the subject matter or result of the suit*, if, in a general sense, it was practicable to do so.[1]

The Code undertakes to abolish these distinctions, and provides general rules respecting parties in all cases and forms of action. The commissioners say, they had a three-fold purpose in view: first, to do away with the artificial distinctions existing in the courts of law, and to require the real party in interest to appear in court as such; second, *to require* the presence of such parties as *are necessary to make an end of the controversy;* and third, to allow otherwise great latitude in respect to the number of parties who may be brought in.[2]

It will be the object of the present chapter to inquire what changes have been effected by the Code,

[1] 2 Story Eq. § 1826.

[2] Report of Com. 123.

and what rules established, in respect to the parties to civil actions. The chapter is divided into three sections. 1st. The appearance of parties. 2d. Who are the proper parties plaintiff. 3d. Who are the proper parties defendant.

SECTION I.

OF THE APPEARANCE OF PARTIES.

In actions at law any one might appear in person, except infants and corporations aggregate; the former must appear by next friend or guardian, the latter by attorney.[1]

As a general rule, a married woman could not sue or be sued alone, either upon contracts made by her before, or after marriage, except in case she was divorced, or the husband was dead in law, or his death was presumed by reason of absence.[2] When she appeared alone she must appear in person, but husband and wife might appear by attorney.[3]

Idiots must appear in person, and a lunatic of full age in person, or by attorney; and the committee of an idiot or lunatic could not maintain an action on behalf of the lunatic; the suit must be brought in

[1] Tidd 69, 70. 2 John. 192. [2] 1 Chit. Pl. 28. 56.
[3] Dunl. Pr. 86.

the name of the lunatic[1] in an action concerning his realty as well as his personal estate.[2] The committee was neither a necessary nor a proper party, either as plaintiff or defendant, in any action respecting the person or property of his ward.

Though it was a contempt of court to sue a lunatic after the appointment of a committee without the permission of the court,[3] yet it has been repeatedly held that the lunatic was liable to be sued in an action at law, and the judgment obtained was not only valid, but regular.[4] The lunatic, and not the committee, was the proper party to appear and defend the suit.

So far as respects the bringing of an action by an idiot or lunatic, the rule of the common law was changed by the statute of 1845,[5] which permits receivers and committees of lunatics, and habitual drunkards, to sue in their own names for "any debt, claim, or demand, transferred to them, or to the possession and control of which they are entitled as such receiver or committee." Before the passage of the Code, therefore, all actions, other than those mentioned by this statute, must be brought in the name of the lunatic, and all actions of every kind against him personally, without joining his committee. We will presently inquire what effect the Code has produced upon this practice.

The rule in respect to the appearance of parties in

[1] Shelf on Lunacy, 395, 24 Wend. 85.

[2] 1 Hill, 97. [3] 3 Paige, 190. 5 Id. 489.

[4] 2 Barb. S. C. R., 153, and cases there cited.

[5] 2 R. S. (3d Ed.) 115.

equity was somewhat different, except in the case of infants and corporations. The first appeared by next friend, or guardian, and could not sue, or be sued in person, or appear by attorney.[1] Corporations aggregate appeared by a solicitor.[2]

In suits in equity, though in general, a husband and wife ought to join,[3] yet, where the wife demanded relief for her separate property, or for a separate maintenance, settled by the husband, she might sue alone.[4] In respect to her separate estate, she was looked upon as a *feme sole*. In a court of equity, though not at law, husband and wife were considered as two different persons. The wife, by her next friend, might sue her husband, and the husband file a bill against his wife.[5] The wife appeared in the action by her next friend,[6] and when the suit was brought, to recover her separate property, the husband was not a proper party as co-plaintiff.[7] A bill filed by the husband, in the name of himself and wife, was his bill merely, and the decree made in such a suit was not binding upon her in any future litigation. Where the interests of the husband and wife were in conflict, he could not join her as co-complainant, but in such case she must be made a defendant.[8] If the husband was abroad, or banished, or an alien enemy, or had abjured the country, a married woman might exhibit a bill alone, as if she were a *feme sole*.[9]

[1] Mitf. Eq. 25. Paige 179. [2] 1 Barb. Ch. Pr. 87.
[3] 5 J. C. R. 196.
[4] 2 Ves. Sen. 452. Ed. on Parties, 144, 13 Ves. 190, 266.
[5] Ib. 5 Paige, 581. [6] 5 Paige, 517.
[7] Story, Eq. Pl. § 63, 10 Paige 193, 6 Barb. S. C. R. 403.
[8] 9 Paige, 255, 3 Barb. Ch. R. 397. [9] Coop. Eq. 204.

If the wife was a *cestui que trust*, and it was necessary she should file a bill, it was done by her next friend.[1] By statute a wife might exhibit a bill for divorce *a vinculo*, without a next friend,[2] but it was held that in a case for a limited divorce she must appear by her next friend.[3] Where the wife was defendant, it was a general rule that in the absence of her husband she must appear by guardian.[4] But where the bill was brought by the husband she was treated as a *feme sole*, and no guardian was necessary in such case.[5] In general, husband and wife must appear and defend together[6]; but if she claimed in opposition to him, or lived separate from him, or disapproved of the defence he wished her to make, she might obtain an order to defend the suit separately.[7] If a married woman under age was a party she appeared by guardian.[8]

The rule in respect to the appearance of idiots and lunatics in suits in equity was also widely different from that which prevailed in the courts of law. Idiots and lunatics almost always sued by their committees; they also answered and defended by their committees,[9] and the lunatic need not be made a party defendant.[10] He *might*, however, be joined, though this was a mere matter of form, and the committee, as of course, put in the answer as his guar-

[1] Ed. on Parties, 146.
[2] 2 R. S. 144, § 39, 2 Paige, 108.
[3] 8 Wend. 370.
[4] Ed. on Parties, 154.
[5] 3 Atk. 478.
[6] Coop. Eq. 24.
[7] Coop. Eq. 30, 31; 1 J C. R., 24; 2 Id. 139.
[8] Ed. on Parties, 155.
[9] Ed. on Parties, 205, 211.
[10] 2 John Ch. R. 242.

dians.[1] Where the lunatic and committee were sued jointly, the latter, if he had no interest adverse to the lunatic, would, as a matter of course, be appointed his guardian *ad litem*.[2] Though a lunatic was not a necessary party in a bill to set aside his own acts,[3] to obtain payment of a debt,[4] etc., etc., yet he was an indispensable party to a bill for the recovery of lands, partition, and other actions concerning real property.[5] It was also laid down as a general and a safe rule that a lunatic ought to be made a party in all actions for the benefit of his estate, and the bill should be filed as his bill by his committee, or in the names of both. The general practice was even where the lunatic was not a *necessary* party, to unite him with his committee.[6]

A similar rule would apply to all kinds of trustees. The *cestui que trust*, if not always a necessary, was almost always a proper party with the trustee in actions concerning the trust fund or property. Where the trustee commenced an action it was generally requisite to make the *cestui que trust* a party, otherwise the latter would neither obtain relief nor be bound by it.[7] In enforcing a demand arising prior to the creation of the trust, against a trustee as defendant, it was not necessary to make the *cestui que trusts* parties if the absolute disposition of the property was vested in the trustees.[8]

We are next to notice how these rules relative to

[1] 2 John. Ch. R. 242.
[2] 6 Paige, 237; 1 C. R. N. S. 309.
[3] 7 John. Ch. R. 139.
[4] 3 Paige, 470.
[5] 3 Barb. Ch. R. 24.
[6] 7 John. Ch. R. 139.
[7] Ed. on Parties, 158; 2 John. Ch. R. 238; 1 Paige, 20.
[8] Coop. Eq. 74, Eden. Parties, 161.

the appearance of parties are affected by the Code. And first,

In respect to infants, the Code provides,

§ 115. When an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge.

By the Revised Statutes,[1] before any process can be issued in the name of an infant, who is *sole plaintiff*, some competent and responsible person must be appointed to appear as his next friend in the suit. It was held under this statute that a next friend was necessary only in cases where the infant was sole plaintiff.[2] The above section of the Code, however, clearly contemplates that an infant must appear by guardian whenever he is "a party," whether as sole plaintiff or jointly with adults. JUSTICE WILLARD, in Hill *v.* Thacter,[3] held that the guardian must be appointed before the issuing of the summons and complaint, and that the provisions of the Revised Statutes were not altered in that respect.

An infant must also appear in all cases by guardian where he is a party defendant. No judgment can be regularly taken against an infant by default,[4] nor can his guardian make any admissions, to affect his rights injuriously, or suffer judgment by default.[5] The answer is termed the answer of the guardian, and not of the infant, and in cases where an oath was necessary, it was sworn to by the guardian.[6] The answer

[1] 2 R. S. 446, § 2.

[2] Hulbert *v.* Newell, 4 How. Pr. R. 93.

[3] 3 How. P. R. 407.

[4] 2 Code R. 28.

[5] 4 Paige, 165.

[6] 1 Barb. Ch. Pr. 148.

could not, however, be read against the infant.[1] Nor could a complainant by any form of pleading compel an infant to become a witness against himself.[2]

There does not seem to be anything in the Code inconsistent with the application of these principles to the new system. In Hill *v.* Thacter, *supra*,[3] it was said that the guardian of an infant plaintiff might, in that character, have verified the complaint under the Code.

No proceedings can be taken against an infant defendant after the commencement of the action until his guardian is appointed. The infant himself has twenty days to make application for the appointment of his guardian, but he may apply after that time unless the plaintiff forestall him in his application.[4]

Appearance of married women.—The equitable rule which recognised the separate legal existence of the wife in cases concerning her individual property, and actions between herself and husband, is enacted by the Code. Section 114 provides:

When a married woman is a party, her husband must be joined with her, except that,

1. When the action concerns her separate property she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone.

But where her husband cannot be joined with her

[1] 6 Paige, 353.
[2] 5 Paige, 536.
[3] 3 How. Pr. R. 407.
[4] McConnell *v.* Adams, 1 C. R., N. S. 114.

as herein provided, she shall prosecute or defend by her next friend."

The words in italics are the amendment made in 1851, to the original Code. Before this amendment it was held in the case of Coit *v.* Coit,[1] and affirmed on appeal by the General Term of the first district,[2] that a wife could not sue her husband without a next friend, except in the single case of a suit for absolute divorce, provided for by statute, and that the Code had made no change in this respect. The same rule was adhered to by the justice, who decided that case at the Special Term, on another occasion.[3]

In the Superior Court of New York, JUSTICE CAMPBELL, after consultation with his associates, held the contrary doctrine.[4] JUSTICE MONSON[5] held, that, in all cases between husband and wife, the latter, unless an infant, might sue alone, without a next friend, and the Supreme Court of the eighth district have made a similar decision.[6]

The above amendment, however, seems to have settled the rule, that, where the wife sues, or is sued by, her husband, she must appear by her next friend, unless indeed in the case of an action by the wife for absolute divorce, and even then, it may well be doubted if the statute permitting her to sue in her own name is not repealed by this provision.

[1] 4 How. Pr. R. 232.
[2] 6 How. Pr. R. 53.
[3] Forrest *v.* Forrest, 3 Code R. 254.
[4] 2 Sand. 715.
[5] 3 C. R. 40. 4 Pr. R. 346, Otsego Special Term, 1850.
[6] 3 C. R. 183.

In the late case of Heller *v.* Heller,[1] JUSTICE HAND at special term, referring, to this amended section, intimates, that now, in all cases, where the husband is not a co-plaintiff or co-defendant with the wife, she must prosecute or defend by her next friend.[2] But the learned Justice evidently gives too extended a meaning to the amendment in question. It is only in cases where the husband "*cannot be joined*" that she is required to appear by next friend; that is, where she prosecutes her husband or defends against him, and also, perhaps, in the class of cases mentioned above, where the husband had abjured the realm, was an alien enemy, &c., &c., in which, under the old system, she was permitted to prosecute or defend separately. But in an action brought by the wife against a third party concerning her separate property, she may still sue alone, and *without any next friend*.[3] The question would seem to be settled by authority, notwithstanding the case of Coit *v.* Coit, and what was said in Heller *v.* Heller, above referred to.[4]

The code does not *in terms* compel the wife to sue alone in actions relating to her separate estate. The words "*may* sue alone," it is said, are not to be construed, "must sue alone." Accordingly, in Van

[1] 1 C. R., N. S. 309.

[2] Also by same Justice, Cook *v.* Rawdon, 1 C. R., N. S. 382.

[3] I do not understand Justice Roosevelt as holding the contrary in Willis *v.* Underhill, 6 How. Pr. R. 396. The reporter's note does not correctly state the decision. He overlooked the important word "*dubitatur*," although it seems the court gave leave to amend by adding a next friend.

[4] See cases cited supra on page 79.

Buren *v.* Cockburn,[1] it was held, that a demurrer would not lie for a misjoinder of parties in such case. This was contrary to the practice before the code; it having been repeatedly held in this State that a suit in relation to the wife's separate property, where the interests of husband and wife were in conflict, could not be brought in the names of both. The wife must prosecute by her next friend,[2] and the husband should be made a party defendant;[3] or, where the husband brings an action, and his interests may conflict with those of the wife, she should be made a party defendant.[4] The action in the name of husband and wife is regarded as the suit of the husband alone,[5] and she, being entitled to her separate action, it is presumed would not be precluded from bringing another. Notwithstanding the case of Van Buren *v.* Cockburn, therefore, it may well be doubted, on the authority of these decisions, whether the practice of joining the husband with the wife in suits where, by the Code, she may sue alone, is correct.

The appearance of idiots, lunatics, &c., by their committees, and of persons acting in a fiduciary or representative character generally, will be treated of in the two following sections.

[1] 2 Code R. 63.

[2] 10 Paige, 193. 9 Id. 255. 6 Barb. 403, 3 Barb. Ch. R. 397, and see ante page 74.

[3] 6 Barb. 403. [4] 3 Barb. Ch. R. 397. [5] Same cases.

SECTION II.

OF PARTIES PLAINTIFF.

THE rule at common law, before the Code went into effect, was, that actions on contract must be brought in the name of the party in whom the *legal interest* was vested.[1] The *legal interest* did not, in all cases, mean the *ownership* of, or *property* in, the contract. Thus a contract might be assigned, but a right of action for a breach of the contract did not pass with the assignment, except in the case of bills of exchange and promissory notes, where the contract was made transferable by law, so as to vest the property absolutely in the assignee.[2] And though in cases other than these, the contract became in fact the property of the assignee, yet a suit for the breach of it could not be in his own name, but must be brought in the name of the assignor or original creditor.[3] The assignee might sue in his own name on a new promise made to him, subsequent to assignment, for this was regarded in the light of a new agreement or contract.[4] If the assignor were dead the assignee must sue in the name of the executors or administrators of the assignor. And by the statute of 1835,[5]

[1] Chit. Pl. 2.
[2] 2 Black. Com. 442.
[3] 1 Chit. Pl. 17. 4 How. Pr. R. 63.
[4] 8 T. R. 595.
[5] 2 R. S. (3d Ed.) p. 445.

if there were no executors, or the executors had no interest, or refused to prosecute, the action might be in the name of the assignee.

In equity the rule was directly the reverse. Courts of equity allowed and protected assignments, and the assignee, in whom was vested the equitable interest and right of property in the contract, was the proper person to avail himself of the remedy.[1] The assignor was neither a necessary nor a proper party plaintiff. Or, as has been well stated, "if the assignee sues at law he is turned out of court, and if the assignor sues in equity he is turned out also."

Real party in interest must be plaintiff.—The Code of Procedure has adopted, with slight modifications, the rule in relation to parties which has heretofore obtained in courts of equity. With the exceptions mentioned in § 113, the suit must be prosecuted in all cases in the name of the party in interest, and the rule which has prevailed in equity, with these modifications, may be very safely applied.[2] By the rule in equity the plaintiff must be, at the time of the commencement of the suit, immediately interested in the subject matter of it, and the suit could not be prosecuted in the name of a mere nominal plaintiff, as might have been done in an action at law, on a negotiable promissory note or bill.[3] And it was a fatal objection, that some of the complainants showed no right whatever to participate in the relief sought.[4]

[1] 5 Paige, Ch. R. 539, 6 Id. 598, 7 Id. 21.

[2] Wallace *v.* Eaton, 5 How. Pr. R. 99. Report of Com. 123 and 124.

[3] Monell, Pr. 20.

[4] 2 Sand. Ch. R. 183.

A right of action for a *tort* is not assignable.[1] And no action can be maintained upon it in the name of the assignee. This was held otherwise at a General Term in the fifth district, and subsequently at a Special Term in the same district,[2] but the amendment of 1851 to section 111 of the Code now declares that "this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." But although the mere right of action for a tort is not assignable, yet after the conversion of a chattel, the owner may sell the chattel itself, so as to give the purchaser a right to maintain an action on a demand for it made by him and refusal to give it up.[3]

In all cases, however, other than those of torts, where the contract has been assigned, the action must be brought in the name of the assignee. Thus where a bank sued on a draft payable to the order of its cashier, and the complaint alleged that it was delivered to the said cashier "for the said bank," it was held on demurrer that the complaint was good, and the suit was properly instituted in the name of the bank.[4]

Substitution of parties plaintiff.—If the contract is assigned after the action is commenced, the action must be continued in the name of the original party, unless the court allows the person to whom the transfer is made to be substituted.[5] So also,

[1] 1 Pet. U. S. R. 183. [2] 2 Com. 293.
[2] Kellogg *v.* Church, 3 C. R. 53. [3] Per Hoyt J. 2 Com. 293.
[4] 4 How. Pr. R. 64. [5] § 121 Am. Code,

too, in case of any other transfer of interest after commencement of suit, or in case of death, marriage, or other disability, the court will allow the action to be continued by or against the plaintiff's representative, or successor in interest.[1] It must, however, in case of the death of a party, be a cause of action which *survives* in order to authorize the court to allow it to be continued by the representative.[2] By statute, actions for injuries to the property, rights, and interests of another survive in the same manner as actions on contract, except, however, actions for slander, libel, assault and battery, and other injuries to the person.[3] In these cases last mentioned, the cause of action dies with the person, and leave cannot be granted to the executor or administrator to continue it, unless in the one case of injury to the person, as provided by the statute of 1847.[4] Where a party prosecuting an action for such an injury dies pending the suit, the court will doubtless allow it to be continued by his personal representative under this section of the Code. The suit, however, must have been actually commenced by the service of the summons before it can be revived on the death of a party.[5]

The term "successor in interest," does not include the people when they claim lands by escheat.[6] And therefore it would not be proper for the court on motion to allow the people to be made a party in an ejectment suit on the death of a plaintiff.

A party claiming to be substituted must show

[1] 4 How. Pr. R. 358.
[2] 3 How. Pr. R. 385.
[3] 2 R. S. (3rd ed.) 543, § 1 and 2.
[4] Chap. 450, page 575, Laws 1847.
[5] 3 Code R. 139.
[6] 4 How. Pr. 329.

who is the successor. He must make out a *primâ facie* case before the right attaches.[1]

The substitution has been refused to be made in a suit pending before the Code took effect, for the reason that the provision as to such suits was unconstitutional.[2] Also, where the principal object of the substitution is to make the original plaintiff a witness.[3]

The "successor in interest," in case of a transfer, or assignment, is the person acquiring the title or property. The "representative" is the administrator or executor in suits which would be properly brought by them, and the heir in actions concerning the realty, as for example an action for an injunction to stay waste, for the recovery of real estate, &c. &c.[4]

As to the joinder of plaintiffs.—The court provides that,

"All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title."[5]

And again:

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court,

[1] 4 How. Pr. R. 329. 1 Denio, 50. [2] 5 How. Pr. 369.
[3] 6 id. 220. [4] See Waldorph v. Bartle, 4 How. Pr. R. 358.
[5] ¶ 117, Am. Code.

one or more may sue or defend for the benefit of the whole."[1]

And again:

"The court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights, but when a complete determination of the controversy cannot be had without the presence of other parties, the court may cause them to be brought in," &c.[2]

It was said by JUSTICE MASON, in the case of Wallace *v.* Eaton, and others,[3] that the section last above quoted was the controlling section in determining whether a demurrer for want of proper parties would lie.[4] "If the court," he says, "can determine the controversy before it without prejudice to the rights of others, or by saving their rights, then a demurrer for non-joinder of such parties is not well taken. If, on the contrary, a complete determination of the controversies cannot be had without the presence of other parties, then the demurrer is well taken, and the court should order them to be brought in by amendments of the pleadings." The same Justice quotes from the remarks of the Commissioners on this subject, as indicating a rule of construction of these sections, as follows: "We have intended to leave suitors very much at liberty to choose whom to make *defendants*, and whom to *join as plaintiffs*. No person can be affected by a judgment but

[1] ¶ 119, Am. Code.
[2] Part of § 122, Am. Code.
[3] 5 How. Pr. R. 99.
[4] See post, chap. vii. section 2.

a party or one who claims under him. This rule will make the plaintiff bring in all the parties whom he wishes to affect. The judgment, as we have seen by section 161 (now section 274), can be given for or against any one or more of the plaintiffs or defendants.

It must be evident, however, that so loose a rule of construction as seems to be indicated by these remarks, cannot be correctly or safely applied as a general rule. If, indeed, this explanation of the Commissioners is entitled to any weight in the construction of the statute, it should be taken in connexion with what was said by them, to be one of the three main purposes in view, namely: "To *require* the presence of such parties as *are necessary to make an end of the controversy*;"[1] in other words, that the *necessary* parties, at all events, must be before the court, and by allowing a demurrer for a defect of parties, this view of the subject is confirmed.

The rules prescribed and re-organized by the Supreme Court of the United States for the practice in equity cases are similar in many respects to these provisions of the Code. It is held in that Court that as a general rule all persons in interest must be made parties before a decree, but no one need be made a party against whom, if brought to a hearing, there can be no decree.[2] No one need be made a party-complainant in whom there exists no interest, and no one a party defendant, from whom nothing is demanded.[3] All persons materially interested in the

[1] Rep. of Com. p. 121.

[2] Sum. 173, 9 Wheat. 733, 1 Gal. 371.

[3] 6 Wheat. 550, 5 Com. 173, 1 Pet. 299, 1 Wash. 517.

matter of a bill, as plaintiffs or defendants, ought to be made parties to it, however numerous they may be; but there are exceptions to the rule,[1] and it should be restricted to parties whose interests are in the issue and to be affected by the decree.[2] If the complainant omits to bring before the court the proper parties, the objection is taken by demurrer, if it appear upon the face of the bill, otherwise by plea or answer;[3] but if the parties are very numerous, and it is difficult to bring them all in, or the question is of general interest, and a few may sue for the whole, then the plea of want of proper parties will not be sustained, but the other parties may afterwards come in and have a rehearing.[4]

These are general and well settled rules of equity and jurisprudence, and there can be little doubt that they are properly applicable to the system under the code. Most of them have been repeatedly recognized and acted upon by the courts of this state.[5] It is laid down as the most general principle in relation to parties to suits in equity, that *every person who is at all interested in the event of a suit, or necessary to the relief, must be a party*, in order to enable the Court to settle the rights of all and make a complete and definite decree upon the merits.[6] All persons who are entitled to any share of a fund are necessary parties to a bill for an account and distribution of it.[7] All persons having a joint and common interest in the relief sought must

[1] 2 Mason, 187. [2] 1 Pet. 299 & 306. [3] 13 Pet. 360.
[4] 2 Mason, 181. 2 Pet., 482, also rules 47 and 48.
[5] 1 John. Ch. R. 437. id. 344. 1 Barb. Ch. R. 59.
[6] 9 John. R. 442. 2 Paige 278. G. Com. 537. 4 ib. 682. 9 id. 321.
[7] 1 Paige 517. 2 id. 280. 6 How. Pr. R. 379.

be made parties either as plaintiffs or defendants;[1] and all persons who are entitled to litigate the same questions are necessary parties to a suit to determine them.[2] Where it is apparent from the bill that there are parties who ought to have been made plaintiffs the defendant may demur; otherwise the objection can be taken by answer.[3]

It seems, therefore, that the above sections of the Code are but re-enactments substantially of the old equity rules relative to parties, and extending these rules to actions at law. The words in Sec. 117, "All persons having an interest in the subject of the action, and in obtaining the relief demanded, *may join* as plaintiffs, &c.," it is said will be construed *must join*.[4] Such, it seems, was the old chancery rule,[5] which absolutely required all persons having a joint interest in the subject matter, and in obtaining the relief sought, to join.[6] And where several persons had a *common* interest arising out of the same transaction, though their interest was not joint, they *might join* as complainants in one suit.[7] As, if the waters of a stream were diverted to the common injury of the mills below, the owners of the mills, though their titles were several, might properly unite in one bill for an injunction.[8] Though persons having adverse or conflicting interests in the subject of litigation, should not join as complainants.[9] When it is said, therefore, that

[1] 11 Paige, 321. [2] 2 Paige, 378. 3 Barb. Ch. R. 625.
[3] 2 Paige, 280. 3 Id. 222. Sel. port. chap. vii. sec. 2.
[4] Monell, Pr. 13. [5] See cases above cited.
[6] See also 9 Paige, 627. [7] 3 Paige, 222. [8] 3 Paige, 577.
[9] 9 Paige, 255. 3 Barb. Ch. R. 397.

the word "may" in the statute will be construed "must," it is presumed nothing more is meant than the application of the old equity rule of pleading, namely, that all persons having a *joint* as well as *common* interest in "the subject of the action, and in obtaining the relief demanded," are *necessary* parties, and *must* join as plaintiffs, except as otherwise provided in title three of the Code. Persons having a *common*, though not a *joint* interest, are *proper* parties, and *may* join; but where the interests in the subject of the litigation are adverse or conflicting, they cannot join as plaintiffs. Section 119 above quoted,[1] seems to confirm this view, by enacting, that "those who are *united in interest* must be joined as plaintiffs;" that is, are necessary parties, except in the case mentioned in the same section, where any of them will not consent, in which case they may be made defendants; or, as the rule was established in equity, they *must* (unless under special circumstances) be made defendants.[2]

The rule, however, that persons having a *common* though not a *joint* interest; or, as it is more broadly expressed in the Code, "all persons *having an interest* in the subject of the action and obtaining the relief sought," are proper parties, and *may* join, is not to be understood literally as allowing in all cases two or more persons, having separate causes of action against the same defendant, though arising out of the same transaction, to unite and pursue their remedies in one action.[3]

[1] Ante page 87. [2] 2 Paige 15, 11 id., 49 id., 321.

[3] As to plaintiffs in an action of ejectment, see 2 R. S. (3 Ed.) p. 401, § 11.

It has been well said that there is a class of cases where it is not proper, under the Code, to join persons as plaintiffs who may have a *common interest* in the subject matter of the suit. In actions that were formerly denominated *ex delicto*,—for injuries to the person, as slander, battery, or false imprisonment, several persons cannot sue jointly; each must bring a separate action, except in cases of slander of title, and of words spoken of partners in respect of their trade.[1] Hence, though the battery or false imprisonment be of two or more persons at the same time, they must bring separate actions. They are not "united in interest," though the cause of action arose at the same time and grew out of the same trespass.[2] The "common interest," it would seem, which would authorize parties, who might maintain separate actions, to join in bringing a single action, must be a common interest in obtaining exactly the same measure and kind of relief. There must be one distinct general right, a community of interest, not merely in the subject matter involved, but also in the relief demanded. Thus, a slander uttered of two persons jointly, cannot enable them jointly to sue, because each demands his separate damages, and the measure of damages might not be the same. There would have to be in effect two verdicts and two judgments in the same suit.

It has, indeed, been laid down in a late case,[3] as a general principle in equity, subject, however, to many exceptions, that several persons having distinct and

[1] 1 Chit. Pl. 74.

[2] Monell Pr. 74.

[3] Murray *v.* Hay, 1 Barb. Ch. R. 59.

independent claims to relief against a defendant cannot join in a suit for the separate relief of each, nor can a single complainant, having distinct and independent claims to relief, against two or more persons, severally, join them as defendants. In that case it was held that a prayer by several complainants for a perpetual injunction to restrain a nuisance might be made, but not for an account, &c., of damages, severally sustained by them. So in the late case of Peck *v.* Elder, it was held that persons owning separate tenements, affected by the same nuisance, might join as complainants.[1]

Upon the same principle is the case cited above, where separate mill owners were held to be properly united in a bill for an injunction, for diverting the stream to the common injury of all.[2] And the rule seems to be that while several complainants cannot demand by one bill several matters of relief perfectly distinct and unconnected, nor enforce joint and separate demands against the same defendant, yet where *one general right* is claimed by the bill, the objection of improper parties cannot be maintained.[3]

Several persons cannot join their several rights in an action to recover specific, real, or personal property.[4] Two persons avowing that the title is in the one or the other, and each contending that it is in himself, cannot join,[5] nor can a person join with him

[1] 3 Sand. 126, and cases cited on page 131.

[2] Hop. 416, 3 Paige, 577.

[3] Halst Eq. 168. 20 Pick. 328.

[4] B. Ch. P. 54. 2 Saund. Pl. and Ev. part 2d. 5th Am. Ed. 769.

[5] 1 Turn. 107.

as co-plaintiff, another who has no interest in the relief demanded.[1] When real estate is sold in lots and purchased by different persons, they cannot be joined in one bill praying for a specific performance. The contract being distinct, a separate suit should be brought against each.[2] But in such case, query, if under the Code, the purchasers cannot join in demanding a specific performance on the part of the vendor?

The provision in the Code that if the consent of a necessary party or plaintiff cannot be obtained, he must be made defendant, the reason being stated in the complaint, is also but a re-enactment of a well established rule in equity.[3] So also of the provision in the same section that where the question is one of a common or general interest of many persons, or where the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole[4].

The provision in section 122 is also designed to conform the practice of making parties more closely to the equity system, and it is precisely the equity rule, namely, that "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in."

[1] 2 Russ 242.

[2] 1 Mad. C. R. 85. [3] 10 Paige, 288, Am. Code, § 119.

[4] 2 Barb. Ch. 362. 11 Conn. R. 112. 9 Cow. 230. 2 Mason 181. Lube Eq. 251. 2 Pet. 482.

An objection for want of proper parties taken at the hearing, it was said, ought not to prevail except in very strong cases, and where the court perceives that a necessary and indispensable party is wanting.[1] Where an objection is made for want of parties the court gives leave to amend and make proper parties,[2] unless where the objection has been taken by the defendant, in his answer, and the complainant neglects to make the proper parties until the hearing. In such case the court will dismiss the bill, or in its discretion order the proper parties to be brought in.[3] The policy indicated by the code[4] is to allow an amendment in all cases, by ordering the proper parties to be brought in at the hearing, on such terms as may be prescribed.[5] An amendment, however, by adding or striking out the names of parties, it is said, cannot be made without leave of the court.[6] Therefore it appears that on a demurrer for want of parties, or an answer setting up such an objection, if the plaintiff has not succeeded in making such parties as will enable the court to determine the controversy, without prejudice to the rights of others, or by saving their rights,[7] he must either dismiss his complaint and commence anew, or apply on motion to the court for leave to amend by adding the proper parties.

The executor or administrator of a deceased part-

[1] 1 Pet. 11. S. R. 299, 306. [2] 4 Wash. 202. 3 McLean, 104.

[3] 4 Paige, 75. 7 Barb. S. C. R. 221. 1 Pet. 138, 139.

[4] §§ 122, 173.

[5] Per Willard Justice, Vandeworker *v.* Vandeworker, 7 Barb. 221.

[6] Rand. agt. Spear, 5 How. 142. id. 99.

[7] 5 How. Pr. R. 99.

ner or joint contractor may unite with the survivor in prosecuting an action on a joint contract;[1] or, it is presumed, if he refuses to join, may be made a defendant under section 119.

Committees of Lunatics and persons suing in a representative capacity.—The Code has also very nearly adopted the equity rule as to parties in cases of trusteeship. Section 111, that every action must be prosecuted in the name of the real party in interest, is made subject to the provisions of section 113, constituting the exceptions to the general rule. This latter section has reference to three classes of persons: 1st. Executors and administrators; 2d. Trustees of an express trust; and 3d. A person expressly authorized by statute to sue; and reads as follows:

"An executor or administrator, a trustee of an express trust, or a person expressly authorized to sue by statute, may sue without joining with him the person for whose benefit the action is prosecuted. *A trustee of an express trust within the meaning of this section shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.*"

Express trusts.—Before the amendment of this section, indicated by the words in italics, it was doubted whether the words "express trusts" did not refer solely to trusts of land authorized by the revised statutes, and which in the statutes are termed "express trusts." In the case of Grinnell *v.* Schmidt,[2] in the N. Y. Superior Court, it was held that the words should not receive this restricted meaning.

[1] Rep. Com. on Code, 126. [2] 2 Sand. 706.

JUSTICE MASON, in the opinion delivered in that case, after consideration with his associates, says: "They are capable of a more extensive signification, so as to include all contracts in which one person acts in trust for, or in behalf of, another. Of this kind are contracts made by factors and other mercantile agents who act in their own names for the benefit of, and without disclosing, their principals." It was also said in that case that the plaintiffs (the factors) were "the proper and the *only* proper persons to bring the action;" thus intimating that the word "may" was to be construed "must," a decision in some respects adverse to the case of Van Buren *v.* Cockburn, supra.[1]

A similar decision was made by the Supreme Court, at General Term, in Erickson *v.* Compton,[2] wherein it was held that it was proper for a principal to sue in his own name, on a contract made by an agent in the agent's own name, but of which the principal was sole owner. It was said, however, that the Code, in abolishing the common law rule in regard to parties in such case, conferred upon the principal the right to sue in his own name, *or* in the name of the agent, at his election.[3]

It was held also in Grinnell *v.* Schmidt, that section 111 of the Code which provides that every action must be prosecuted in the name of the real party in interest, &c., was but a statutory enactment of the rule respecting parties which has always prevailed in courts of equity, and the court was

[1] 2 Code, R. 63.

[2] 6 How. Pr. R. 471, General Term, 7th District.

[3] Per T. R. STRONG, J.

bound in its application to adopt, as far as practicable, those principles which have been found to be best suited to advance the ends of justice. According to these principles, as we have seen,[1] the committee of a lunatic might prosecute a suit in equity to avoid the acts of the lunatic, to obtain payment of a debt, &c., &c., without joining the lunatic, and therefore independent of the statute of 1845,[2] the Code, if this interpretation is correct, confers power upon the committee to do the same. Whether the words "express trust" may be construed in such a manner as to authorize the committee to prosecute an action concerning the real property of the lunatic without joining him may be doubted, but it by no means follows that such actions must be brought in the name of the lunatic alone.[3] On the contrary, the rule applicable to parties under the equity system would undoubtedly apply to such cases, and the committee, if not a necessary, would at least be a proper party to the complaint,[4] as the complaint of the lunatic in the names of both.

Similar rules also would apply as to the appearance of a lunatic defendant.[5] He is, perhaps, a necessary party in actions concerning his realty, and may

[1] Ante page 96.

[2] 2 R. S. (3d ed.) 115, § 7.

[3] In the note to § 113 in Voorhies' ed. of the Code, it is intimated that such actions must still be brought in the name of the lunatic.

[4] 3 Barb. Ch. R. 24. 7 John. Ch. R. 139.

[5] It is held by the U. S. Supreme Court that a lunatic must be a party; and if he has a committee, the committee must answer for him; if he has none, the court will appoint a guardian to answer. 4 Wash. 202.

be, under the Code, properly joined with the committee in all cases; the committee as, of course, putting in the answer of the lunatic as his guardian.[1]

As to other trustees and *cestui que trusts*, similar rules will apply. It was long the practice in Chancery, when a trustee commenced a suit, to require the *cestui que trust* to be made a party, otherwise it was said the latter would neither obtain relief nor be bound by it.[2] Still the rule was not imperative. And when the *cestui que trust* filed a case (except against the trustee), both ought always to be joined as parties. Where the action is to remove the trustee, or for an account, &c., all the *cestui que trusts* interested in the estate must join. A married woman in such case must sue alone by next friend, making her husband a party defendant.[3] A mere nominal trustee could not bring a suit in equity in his own name, but the *cestui que trust* must join.[4] But trustees of real estate, for the payment of debts or legacies, might sustain a suit, either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom they were trustees.[5] So assignees, or other trustees of a fund, for the benefit of creditors, might sue for the protection of the fund, or the collection of part of it, without making the *cestui que trusts* parties.[6] But though the *cestui que trust* was not in such cases a *necessary* party, still he might be properly joined in actions prosecuted

[1] C. R N. S. 309, 6 Paige, 237, 2 John Ch. 242.

[2] See Ed. on Parties, 158, and cases cited.

[3] 6 Barb. C. R. § 403. [4] 2 John. Ch. R. 38.

[5] Mitt. Pl. 174. [6] Barb. Ch. R. 254, 4 Paige, 23.

for the benefit of his estate.[1] It is scarcely to be supposed that the Code designed to change the equity rule in this respect, or do anything more than *authorize* a trustee of an express trust to sue alone, permitting him, however, to join the *cestui que trust* in actions prosecuted for the benefit of the estate. What was said in the case of Grinnell *v.* Schmidt, above alluded to, though intimating that the word "may" was to be construed "must," was a mere dictum, and was not necessary to the decision of the case. That the agent or trustee in that case was the "*only* proper person to bring the action," does not necessarily mean, that the person for whose benefit the action is really prosecuted, might not also be a party.

Executors and Administrators are also authorized by the Code to sue and be sued without joining the persons for whose benefit the action is prosecuted. This, of course, relates only to actions concerning the personal property, and actions for wrongs to the deceased specified by statute. The executor or administrator has nothing to do with the real estate of the deceased; and actions concerning it, should now, as before the Code, be brought by the heir or devisee in whom the title vests. In an action to recover the possession of, or to determine any claim to real estate, the heir, and not the executor, is the representative of the deceased, and the only proper person to continue such action. Though in an action to foreclose a mortgage, the executor, and not the heir, is the proper party plaintiff—the mortgage being assets in

[1] Paige 20, 3 Edw. 175.

the hands of the executor; in such a case, the heir is a proper party defendant.[1] And an action for the breach of the covenant of seizin or against incumbrances, accrues to the personal representatives, and must be by the executor, and not by the heir.[2] But an action on a covenant which runs with the land, such as a lessor's covenant to repair damages by fire,[3] a covenant not to erect buildings in front of the premises conveyed,[4] a covenant of warranty,[5] must be brought in the name of the heir, he being the real party in interest.

An executor or administrator is not a proper party to a suit for a partition of real estate, nor for an injunction to restrain waste, or trespass to lands, or for a specific performance of a contract made with deceased to convey lands, &c., &c. The Code does not intend, in this respect, to alter the rule as it existed before.

Persons expressly authorized by statute are also excepted from the operation of section 111 of the Code and may still prosecute, notwithstanding they may not be the "real parties in interest." It is not deemed necessary to enumerate the various cases where persons are by statute authorized to sue. It includes all town and county officers,[6] supervisors, loan officers or commissioners of loans of a county, county superintendents of poor, commissioners of common schools, commissioners of highways, trustees of school dis-

[1] Ed. on Parties, 9.
[2] 3 Denio, 284.
[3] 2 John. 1 id. 395, 11 id. 122, 15 id. 497.
[4] 2 R. S. 325, § 6.
[5] 4 John. 72, 10 Wend. 142.
[6] 4 Paige, 510.

tricts, and town superintendents of common schools.[1] It was said by JUSTICE BRONSON, in supervisors of Galway *v.* Stimson,[2] that, in general, all public officers, though not expressly authorized by statute, have a capacity to sue commensurate with their public trusts and duties; the authority to bring all suits which the proper and faithful discharge of their official duties required, being an incident to their office.[3] The Code, however, seems to have limited the right of action to persons *expressly authorized* by statute. The action should not be merely in the name of office, but in the name of the officer, with the addition of his name of office.[4] Commissioners of highways, under the statute, cannot maintain an action of trespass for injury to the highway.[5] It has also been held at special term in two anonymous cases not reported, that they cannot maintain an action against a railroad company to compel such company to restore the highway to its former state of usefulness, according to the obligation imposed by statute.[6]

The president of a bank, incorporated under the general banking law, is authorized by statute to prosecute all actions brought by or on behalf of such incorporation.[7] It seems that such actions may also be, and perhaps under the Code should properly be, brought in the name of the bank.[8] In case the ac-

[1] 2 R. S. 569, § 107.
[2] 18 John. 407.
[3] 25 Wend. 365. 1 Denio, 510.
[4] Per BROWN, Justice 2d District, and per WRIGHT, Justice 3d District.
[5] Chap. 260, laws of 1838, § 21.
[6] 24 Wend. 345.
[7] 4 Hill, 136.
[8] 4 Hill, 136.

tion be brought in the name of the president, it should be with the addition of his title and the allegation made in the complaint that he is such president, and that the bank was organized under the provision of the general banking act. If it appear upon the complaint that the cause of action belongs to another, it should also affirmatively appear that the person suing is expressly authorized by the statute to bring the action instead of the real parties in interest.

SECTION III.

OF PARTIES DEFENDANT.

In regard to the defendant in a civil action the Code provides:—

"Any person may be made a defendant who has, or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein."[1]

This general rule which the Code prescribes to regulate the practice, in respect to making parties defendants, is, in effect, a re-enactment of the equity rule of pleadings, and was not probably intended to prescribe any other, or different principle, than here-

[1] Am. Code, § 118.

tofore tested the sufficiency of pleadings in equity. And first, it may be observed that this section does not mean to leave the plaintiff at liberty to select just such parties as he chooses to affect by the judgment, and none other. If there are *necessary* as well as proper parties to an action as plaintiffs; so too, there are *necessary* as well as proper parties, defendants. That the Code clearly contemplates this, is apparent from the fact that provision is made for raising an objection either by demurrer or answer, that there is a "defect of parties, plaintiff *or defendant.*"[1]

The parties who are to be made defendants, are the parties in interest, the interest involved in the issue, and who necessarily are to be affected by the judgment.[2] All persons concerned in the demand, or who might be affected by the relief prayed, and all persons entitled to litigate the same questions, are necessary parties in a suit to determine them.[3] The rule that parties in interest, that is, having a right in the subject matter of the controversy, which might be affected by the judgment, must be made parties, though not applicable to bills for discovery, applied generally to all suits for mere relief.[4] A decree would not be made unless all the parties in interest were before the court;[5] and the principle is just as applicable now as it was before the passage of the Code.

But can a plaintiff under the Code, after joining such parties as are necessary and proper, unite with them others, who have no legal right in the contro-

[1] Am. Code, § 144. [2] 1 John. ch. 344, 9, 1 Barb. Ch. R. 59.
[3] 3 Cow. 537, 2 Paige, 278, 3 Barb. Ch. R. 625.
[4] 1 McCord, Ch. R. 301. 7 Conn. R. 342.
[5] 9 John. 442, 11 Paige, 438, 3 Id. 466. 7 Cranch, 72.

versy which may be affected by the judgment? It seems manifest that he cannot, if the objection is taken at the proper time by the demurrer or answer. There is no provision in the Code authorizing an action to proceed against a defendant, in respect to whom there is no legal or suitable cause of action. Nor was there anything in the old system which authorized it. It is not right in any case to make a person a party to a suit unless a decree can be obtained against him, and no one is to be made a defendant merely to pay costs.[1] Bills have been dismissed on the ground of making persons parties to the end that they may litigate their own title.[2] No person can have a right to call another into court to make him contest a future legal right.[3] The commissioners of the Code say that they intend to leave the plaintiff at liberty to "bring in all the parties whom he wishes to affect," and that inasmuch as judgment may be given for or against any one or more of the plaintiffs or defendants, the plaintiff who shall bring in too many parties will merely encounter the hazard of paying costs.[4] That is, we presume, if the objection of too many parties is not taken by demurrer or answer, it is held to be waived,[4] and cannot be raised on the trial; but in such case the court is to determine which are the unnecessary parties, and give judgment dismissing the complaint as to them with costs, while the plaintiff gets his relief as against the other defendants. The commissioners certainly could not

[1] Ed. on Parties, 14.
[2] 1 Eden, 520.
[3] Id. 13.
[4] Rep. of Com. 125.
Am. Code, § 148.

mean that the suitor himself was to choose whom to make defendants, because they elsewhere say a main object has been "*to require the real party in interest to appear in court as such.*"[1] Section 120 is also repugnant to any such idea, because it expressly provides a class of cases in which the right is given to a plaintiff to include several defendants in the same action.

"Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, *all or any of them*, be included in the same action, at the option of the plaintiff."[2] It cannot be doubted, therefore, that an objection for a misjoinder as well as for a non-joinder, may be taken as prescribed by the code by demurrer or answer,[3] and that, too, on behalf of any defendant. Every defendant has an interest in not having any persons made co-defendants but those whom the nature of the case renders it necessary or proper to bring before the court. Persons who are not necessary parties cannot have any interest in the matters of the suit, and when defendants having an interest are united with defendants having no interest, if the fact appear on the face of the complaint, it will be bad on demurrer.[4]

In respect to section 120, above quoted, it may be remarked that it applies to *written* instruments or obligations. No distinction, however, is made between such instruments as are sealed, and such as are unsealed. Persons severally liable on such instruments

[1] Rep. of Com. 123. [2] Am. Code, § 120.

[3] See Conde *v.* Shepherd, 4 How. Pr. 75.

[4] 2 Russ. 87. Ed. on Parties, 13. Laport, chap. vii. sec. 2.

may, *all or any of them*, be included in the same action. By statute the maker and endorser, drawer and acceptor of a promissory note, or bill, might be joined;[1] and this provision is retained by the section of the Code referred to. That section, however, goes farther, and makes one or two changes which it is important to notice. A joint action at common law could not be maintained on a covenant entered into by two or more *severally*.[2] So, if the contract was *joint* and *several*, the plaintiff must sue *all* jointly or *each* separately, and could not sue two of three, or more of the parties.[3] These principles, so far as they affect every description of written instrument or obligation, are now changed by section 120 of the Code; the plaintiff, at his option, being at liberty to sue any one, or more, or all the parties so liable. But in a late case[4] it has been held that the section does not authorize the joinder of a person liable as a mere guarantor, with the principal in a covenant under seal, though the guarantee was executed on the same day, and on the same piece of paper. The covenant of the principal, and the covenant of the guarantor, it was said, are not the "same obligation or instrument" within the meaning of the Code, and on a demurrer to such a complaint judgment was rendered for the defendant. This differs from the case of Enos *v.* Thomas,[5] in which it was held that the principal and

[1] Laws 1832, p. 489, § 1. 1835, p. 248.

[2] 1 East. 226, 227. [3] 37 R. 762. 1 Saund. 291.

[4] DeRidder *v.* Schermerhorn, 10 Barb. S.C. R. 638. Special Term, per WILLARD, J.

[5] 4 How. Pr. R. 48.

surety might properly be joined in one action,—and such, I think, is doubtless the correct practice since the late amendment to section 167.

It is improper to make one who acts ministerially a defendant.[1] Nor can a person be made a defendant on the ground of his being an agent merely.[2] The assignee of a judgment is a necessary party to a suit for a perpetual injunction thereon,[3] and an assignee of a mortgage may be made a defendant in an action to set aside the mortgage as erroneous.[4] But a judgment creditor in a complaint to set aside an assignment need not make all the creditors parties;[5] though it would be otherwise in an action to establish and carry out the assignment.

It has been recommended as correct practice, in the case of an action prosecuted by the assignee of a chose in action, to make the assignor defendant,[6] after a demand pursuant to section 119 of the Code;—but it is difficult to see how an assignor, who has absolutely transferred his interest, can, under ordinary circumstances, be a proper party to an action. It is clear that he could not join as plaintiff, because he is not the real party in interest; and, therefore, he could not properly be made defendant by virtue of section 119. An assignee could not sue in equity in the name of the assignor;[7] nor was the absolute assignor of a chose in action a proper party to a suit for its recovery.[8] And it was never necessary, in an

[1] 3 Atk. 147. [2] 1 Barb. Ch. R. 157. [3] 11 Paige, 438.
[4] Niles v. Randall, 2 C. R. 31.
[5] 1 C. R. N. S. 325. 6 How. Pr. 379.
[6] Note to § 111 Code, Voorhies' Ed.
[7] 5 Paige, 539, 6 id. 583. [8] 2 Paige, 289.

action for relief, and not for discovery, where all the equitable interest had been assigned over, to make the assignor a party.[1] It can neither be necessary nor proper to do so under the Code.

In what were formerly denominated actions at law, it cannot, as a general thing, be a difficult matter to determine who are proper parties defendant. The old rules of pleading are, in the main, applicable. There are, however, some exceptions. Thus one partner, or tenant in common, could not sue his co-partner or co-tenant at law; nor could a *cestui que trust* sue his trustee. The remedy was in equity.[2] Now, by the Code, the same form of action is adopted in all cases; and a co-partner or co-tenant may be made a defendant, as a trustee may to answer his *cestui que trust*.

Where, in an action on contract, there are several parties, if the contract be joint, they must all be defendants,[3] even if one of them have a certificate of bankruptcy.[4] If one be dead, the survivors are the proper defendants.[5] But section 118, say the commissioners of the Code, will enable a plaintiff to exhaust, in one suit, his remedy against a surviving partner, and the representative of a deceased partner.[6] And so also, it is presumed, in the case of the death of one of several contractors, party to any joint contract. The doctrine was recognized in the late case of Ricart *v.* Townsend and others,[7] wherein it was said, that if the action was brought to reach the

[1] 4 Mitf. Pl. 179, 5 Mad. 475.
[2] 1 Chit. Pl. 34 and 38.
[3] 1 Chit. Pl. 41. [4] 6 Taunt. 178. [5] 15 Wend. 318.
[6] Rep of Com. 126. [7] 6 How. Pr. R. 460.

partnership property, the surviving partner is a *necessary* party, and the representatives of the deceased partner are *proper* parties, because they have an interest in the controversy. But in such case, the prayer of the complaint should clearly define the particular kind of relief which the plaintiff seeks against each party; if not, it may be corrected on motion.[1]

Where the contract is so framed that it does not confer upon the plaintiff a remedy against the contractors jointly, but each is only separately responsible for his own act, it is essential to sue them separately.[2] The Code, however, as we have just remarked,[3] conformable to the existing statute authorizing suits against parties to bills and notes, permits persons severally liable on written obligations or instruments, including bills of exchange and promissory notes, to be joined as parties defendant.[4]

Where the contract is several, as well as joint, the plaintiff is at liberty to proceed against the parties jointly, or each separately, though their interest be joint.[5] An infant or married woman contracting jointly with adults, is not a proper party defendant, because not capable of entering into a contract.[6] In an action on a bond executed by a married woman and her husband, she should not be joined; but she would be a proper party in an action to foreclose a mortgage given to secure the payment of such bond,

[1] 6 How. Pr. R. 460. [2] 1 Chit., Pl. 43. [3] Ante page 106.
[4] Slocum *v.* Hooker, 10. L. O. 49.
[4] Am. Code, § 120.
[5] 1 Chit. Pl. 45.

the legal interest in the premises being vested in her.[1]

In an action for a wrong, the person committing the injury, either by himself or his agent, is in general to be made the defendant. All persons who direct or order the commission of a trespass, or the conversion of personal property, or assist upon the occasion, are in general liable as principals, though they may not have been benefited by the act;[2] and, in some cases, a party may be sued, though he neither committed the act nor assented to it, as for the negligence or unskilfulness of a servant or agent while acting in the course of his employ;[3] but not, however, if the injury was wilful.[4] All or any of the parties to a tortious act, or one alone, may in general be sued as defendants.[5] At least such was the rule, and there does not seem to be anything in the Code to render all joint wrong-doers necessary parties in an action for the wrong. There are, however, some torts which in legal consideration are considered the separate act of each wrong-doer, and a joint action will not lie against two or more, as for verbal slander or an action on a penal statute.[6]

It may be here remarked that where two or more causes of action are united under § 167 of the Code, such causes of action "must affect all the parties to the action." In other words, parties cannot be joined either as plaintiffs or defendants, unless the causes of action exist in the same right, in favor of all the

[1] 4 How. Pr. R. 75. Conde *v.* Nelson, 2 C. R. 58.
[2] 11 John. 285, 1 Sand. 47.
[3] 4 Comp. 72. 1 Chit. Pl. 80. [4] Ib. [5] 6 John. 31.
[6] 6 John. 32. 1 Chit. Pl. 85.

plaintiffs, and against all the defendants.[1] This principle will be further discussed in the following chapter on the joinder of actions.

An action to recover the possession of personal property, is a substitute for the action of replevin as it before existed. The action is possessory for the recovery of specific property with damages for its detention as under the revised statutes. Accordingly in Roberts *v.* Randel,[2] the Superior Court of New York, after a consultation of all the judges, held that under the Code an action for the recovery of personal property could not be maintained against a defendant who has not in fact or in law the possession or control of the property claimed. The cases in the Supreme Court of Cary *v.* Hotaling, and Olmstead *v.* Hotaling,[3] were declared to be not well founded, and the rule laid down that under the Code and under the Statute, as at common law, the action was still purely a possessory action, although by the statute it was extended to cases where, at common law, even if the goods were in the defendant's custody, trover or detinue were the only remedies.[4] Therefore, one who has taken or converted personal property is neither a necessary nor a proper party to an action for the recovery thereof, where he has absolutely parted with the possession, and has no legal control over the property.

An action to recover the possession of real property, is also, as under the statute and at common law, a possessory action. It could not, under the statute, be maintained by a plaintiff against a person

[1] 4 How. Pr. R. 48. 10 Barb. S. C. R. 638.
[2] 3 Sand. 707. [3] 1 Hill, 311, 317. [4] Id. 714, 715.

merely claiming title, when there was an actual occupant;[1] nor could such person claiming be joined with the actual occupant, except on his own application, and never at the election of the plaintiff.[2] The phraseology of section 118 of the Code, and the 17th section of the statute (2 R. S. 3d ed. p. 435) is the same—"*Any person may be made a defendant;*" but this has been expressly held under the statute to mean only on the application of the person claiming title, where there was an actual occupant, and not at the option of the plaintiff.[3]

It has been held at special term in the third district that this rule is much changed, and that in an action to recover possession of land all persons claiming title to, or an interest in, the property, may be made defendants, as well as the persons in actual possession.[4] With deference to the opinion of the learned Justice making this decision, it may well be doubted whether it can be sustained. A case not reported arising under the Code, and involving precisely the same point, was subsequently argued on appeal at the General Term in the same district, and a verdict for plaintiff set aside.[5]

[1] 2 R. S. (3d ed.) 400, § 4. The same has been held at Circuit since the Code. See note 5 below.

[2] 2 R. S. 435, § 17. 12 Wend. 561–2. 25 Id. 434.

[3] Shaver *v.* McGraw, 12 Wend. 558.

[4] Per PARKER, Justice, 4 How. Pr. R. 358.

[5] NOTE.—Barton *v.* Vought. Judgment rendered at the February General Term, 1852. In this case the plaintiff sued the landlord claiming title. On the trial at the Columbia Circuit, it appearing that a tenant was in actual possession, Justice Willard ordered the complaint to be dismissed, but gave the plaintiff liberty to amend by adding the landlord as a party. At a subsequent trial the ques-

Amendment to section 122 of the Code, (made since the decision of Justice Parker in Waldorph *v.* Bartle,[1]) gives the court power, when a person in interest, not a party in action, for the recovery of *real* or *personal* property "makes application to be made a party," to make him such party by the proper amendment.[2] This would seem to settle the rule precisely as it was under the revised statute, and as laid down in Shaver *v.* McGraw,[3] and in Roberts *v.* Randell, supra,[4] that the party in actual possession, and having the control and the right of possession, is the only proper party defendant in an action to recover the possession of either real or personal property; but that the court will allow under § 122 of the Code any person having an interest, on his own application, to be made a party. This view of the case is also sustained by comparing sections 455 and 471 of the Code, which make existing statutory provisions relating "to actions concerning real property" applicable to actions brought under the Code, with sections 28, 30, and 33, R. S., 3d Ed. p. 403 and 4.

Parties occupying land in severalty, cannot be proceeded against by the general owner, jointly under the Code.[5]

tion of the misjoinder of parties was raised, and a verdict for plaintiff was taken, subject to the opinion of the Supreme Court. That court granted a new trial, and although there was another controlling question presented in the case, still it was understood that the majority of the court held the point relative to the misjoinder of the parties well taken. The author speaks of this case from personal knowledge, as he was engaged as counsel on the trial of the cause, and also on the argument at General Term.

[1] 4 How. Pr. R. 358.
[2] Am. Code, § 122.
[3] 12 Wend. 561, 2.
[4] 3 Sand. 707.
[5] Fosgate *v* Man, 9 Barb. S. C. R. 296.

In respect to making those who are sued on account of another, parties defendants, such as committees of lunatics, trustees of express trusts, as provided by section 113 of the Code, executors, and administrators, &c.; the reader is referred to what was said ante pages 96, 97.

Where a complainant claims in opposition to a deed of trust, or assignment, as fraudulent and void, he may proceed against the assignee or trustee without joining the *cestui que trust.*[1] The trustee or assignee, however, is a necessary party; so also the assignee of a judgment is a necessary party for a perpetual injunction thereon.[2]

In actions to foreclose a mortgage, the owner of the equity of redemption is a necessary party.[3] But the mortgagor, though he is personally liable for the debt, is only a proper and not a necessary party to a bill of foreclosure against his grantee, and the grantee cannot object that the mortgagor is not a party.[4] The assignee of a bond and mortgage may make the assignor, who guaranteed their collection, a party, in order to obtain a judgment against him for the deficiency.[5] One claiming adversely to the mortgagor cannot be made a party for the purpose of trying the title.[6] But quere, whether, under the Code, this may not be done? On a bill to foreclose a mortgage, all incumbrancers existing at the commencement of the suit,

[1] 4 Barb. S. C. R. 232, id. 453; 3 Paige, 379, 4 id. 33, 1 C. R. N. S. 325; 6 How. Pr. R. 379.

[2] 11 Paige, 438. [3] 10 Paige, 409.

[4] 6 Paige, 343. [5] 9 Paige, 90.

[6] 6 Paige, 635; 2 Barb. S. C. R. 20; 3 Barb. Ch. R. 438

should be made parties;[1] and where legacies are charged upon the land, legatees are necessary parties, though the mortgage is subsequent to the charge.[2] It is not necessary or proper to make the executor of a mortgagor a party defendant; the party in interest is the heir,[3] but the personal representative of a mortgagor should be a party for the execution of a trust for sale, by way of mortgage; an account cannot be taken in his absence.[4] And in general, all persons having an interest in the equity of redemption, should be made parties.[5] And whether the incumbrancers are prior or subsequent to the mortgage, they are proper if not indispensable parties to a complaint for foreclosure.[6]

In an action for partition of lands.—It was held, previous to the revised statutes, that neither a mortgage nor a judgment creditor was a proper party to a partition suit, and their rights could not be affected by a sale.[7] But the revised statutes have altered the rule, and have authorized the court to decree a sale which will give the purchaser a perfect title, discharged from all liens and incumbrances. By statute, it is not necessary in the first instance to make a creditor, having a lien on the premises by judgment, decree, mortgage, or otherwise, a party to the proceedings. But the complainants may at their election make every creditor, having a *specific lien* on the undivided estate or interest of any of the parties by

[1] 4 John. Ch. R. 605, 3 id. 459; Act of 1844, amending act of 1840; 1 Barb. Ch. R. 490. [2] 6 John. Ch. R. 450.
[3] Ed. on Parties, 93; 1 John. Ch. R. 252.
[4] Ed. on Parties, 97. [5] Story, Eq. Pl. 17.
[6] Id. 3 John. Ch. R. 459. [7] 7 John. Ch. R. 140. 1 Paige, 469.

mortgage, devise, or otherwise, a party to the proceedings.[1] Every person entitled to dower, if it has not been admeasured, must also be a party.[2] Tenants in common (unless owners unknown) must all be parties; otherwise, a partition cannot be decreed.[3] Where a person has parted with his title, and no relief is prayed for or against him, he is not a proper party to an action for the partition of real estate.[4] Before the Code, it was held that where the title was denied, or not clearly established, a bill for partition could not be sustained; but the bill would be retained to give the plaintiff an opportunity of establishing his title at law.[5] This is, doubtless, otherwise by the Code; the parties may now litigate the title in an action for partition, the distinction between actions at law and in equity being abolished.[6]

[1] 2 R. S. 318, §§ 8 and 9; 2 Paige, 27.

[2] Id. [3] 2 Barb. Ch. R. 398.

[4] 7 Barb. 225; 2 Barb. Ch. R. 407. [5] 1 John. Ch. R. 14.

[6] As to who are proper parties in actions for other equitable o specific relief, see Story, Eq. Pl., Lube, Pl., Mitf. Eq. Edward on Parties, &c.

CHAPTER III.

OF THE JOINDER OF ACTIONS.

THE Code, as amended in 1852, provides for the joinder of actions as follows :—

"The plaintiff may unite *in the same complaint* several causes of action, *whether they be such as have been heretofore denominated legal or equitable, or both*, where they all arise out of—

"1. *The same transaction or transactions connected with the same subject of action.*

"2. Contract, express or implied; or,

"3. Injuries with, or without force, to person *and property, or either;* or,

"4. Injuries to character; or,

"5. Claims to recover real property, with or without damages, for the withholding thereof, and the rents and profits of the same; or,

"6. Claims to recover personal property, with or without damages, for the withholding thereof; or,

"7. Claims against a trustee, by virtue of a contract, or by operation of law.

"But the causes of action, so united, must all belong to one of these classes; and must affect all the parties to the action, and not require different places of trial; and must be separately stated."[1]

[1] Am. Code, § 767.

The words in italics indicate the amendments made by the Legislature of 1852 to the Code of 1849.

The conflicting decisions, made before this amendment, in respect to the joining of causes of action for both legal and equitable relief, have already been noticed.[1] The amendment settled the practice in this respect, by providing, in terms, that claims for both legal and equitable relief may be united in the same action. In Alger *v.* Scoville,[2] it was said that an action could not be maintained on a contract against one defendant, united with a cause of action against another defendant, as trustee; as, for example, a claim against one defendant for a money demand and interest, with a claim for the removal of another defendant as assignee. It was also held a sufficient ground for demurrer, that the complaint contained distinct causes of action, in some of which the defendants were not interested.

The amendment contained in the first subdivision of the above section, was probably designed to reach such a case, by providing that causes of action, whether legal or equitable, or both, might be joined where they all arise out of "*the same transaction or transactions connected with the same subject of action;*" thus authorizing the joinder of a claim for the recovery of a demand on a contract, with a claim to satisfy the same demand out of property in the hands of an assignee of the debtor, he being made a party defendant for that purpose.

It must be admitted, however, that the language

[1] Ante chap. i. sec. 3.

[2] 6 How. Pr. R. 131.

used in this clause of the section is vague and indefinite, and in the absence of any judicial interpretation it is difficult to say what may be its true signification. Is the clause to be construed as the controlling clause of the section, and as qualifying all the rest, so as to allow distinct causes of action, such for example as a contract, and a claim to recover personal property, to be joined, provided they both or all arise out of the "same transaction or transactions, connected with the same subject of action?" This might seem to be the intention from the fact that the section before the amendment provided that "the causes of action so united must all belong to one *only* of these classes"—and by the amendment the word *only* is omitted. Under such a construction if A unlawfully takes possession of the house and furniture of B, and withholds the same, B might be allowed to unite an action to recover the possession of the personal property, with an action to recover the real property, (claiming his general damages for withholding both,) and an action for injury done to the personal property and freehold.

Or was the amendment intended even to go further, and permit a plaintiff to unite distinct causes of action (arising out of the "same transaction," &c.) against different defendants, having different rights, interests, and independent and separate defences?

It is difficult to say whether all this is intended, by the amendment in question, or, indeed, what is intended except perhaps in one respect. In the case of Alger *v.* Scoville the word "only" in the statute was insisted upon by the court as a controlling word to sustain the decision. The word "only" being now

omitted that decision may safely be considered no longer an authority. The amendment is at least a legislative reversal of Alger *v.* Scoville. Until judicially interpreted, we should hesitate to say it was anything more.

Under the former practice the joinder of actions was generally considered with reference to two things, namely, first, the joinder of different *forms* of action, and second, of different *rights* of action. Different forms of action could not as a general thing be joined, as an action of assumpsit and debt, or assumpsit and covenant, though both arose upon contract. But if the form of action was the same, the plaintiff might unite as many causes of action in the same declaration as he pleased; as for example, debt on a simple contract, with debt on a bond or other specialty.

These distinctions, with respect to the *form* of the action, are, of course, abrogated by the Code; and the only distinction recognized is that which respects different *rights* of action. These are classified by the Code as set forth in the section above quoted; and though the classification is essentially different from the former system, and allows the plaintiff a much wider latitude in the joinder of causes of action than formerly, yet, it is said, that, subject to this different classification, the rules to determine what causes of action may be joined, are not changed.[1] Different rights of action, therefore, not existing in favor of all the plaintiffs, and against all the defendants, it is presumed cannot be joined, though belonging to one

[1] Enos *v.* Harman, 4 How. Pr. R. 48.

only of the several classes enumerated.[1] Thus now, as formerly, a plaintiff cannot bring a joint action against two, and state in one part of his complaint that one of them assaulted and beat him, and in another part that the other defendant took away his goods.[2] But a plaintiff may join a demand due him in his own right, with a demand due him as survivor;[3] though he cannot join a demand in his own right with another due him as executor;[4] nor can a demand against the defendant, as executor, be united with one against him individually;[5] nor can a count, on a promise by husband and wife, be joined with a count on a promise by the wife, *dum sola*;[6] the general rule being, that the several causes of action should all exist in the *same right*, otherwise they cannot be joined.

Before the last amendment to the section of the Code, which defines what causes of action may be joined, it was held that a claim for money had and received, could not be joined in a complaint with a claim founded on a refusal to deliver up certain notes alleged to have been paid.[7] Also, that claims for injuries to personal property, and to recover its possession, are substantially different causes of action.[8]

Malicious indictments or prosecutions, are an injury

[1] See De Ridder *v.* Schermerhorn, 10 Barb. S. C. R. 638.

[2] 2 Saund. 117, 4 T. R. 360. [3] 3 T. R. 433, 5 Id. 403.

[4] 1 T. R. 489, 3 Id. 659, 4 Hill, 492.

[5] 4 Sand. Ch. R. 31. [6] 16 John. 281.

[7] Cahoon *v.* Bank of Utica, 4 How. Pr. R. 423, 3 C. R. 110.

[8] Spaulding *v.* Spaulding, 3 How. Pr. R. 287, Dow *v.* Green, Id. 377.

to character;[1] accordingly, under subdivision four of this section of the Code, it has been said that an action for malicious prosecution may be united with an action for slander or libel.[2] But, query, if malicious prosecution is not also an injury to the person, and may not, under subdivision three, as amended, be joined with an action for assault and battery, trespass to property, real or personal, and criminal conversation. Criminal conversation with the wife, is said to be an injury to the person of the husband;[3] and, of course, the three last mentioned causes of action may be united in the same complaint.

Under this subdivision, the plaintiff may unite different claims against the same person or persons for every kind of injury to his absolute or relative rights of person or property, except only that class known exclusively as injuries to character.

So, too, under the second subdivision, he may unite actions arising on every species of contract, express or implied, sealed or unsealed, in writing, on judgment or by parol.

The joinder of these different causes of action, however, in all cases is limited by the provision of the Code, that they must "affect all the parties to the action, and not require different places of trial, and must be separately stated."

They must affect all the parties to the action; that is, within the rule above stated, they must all exist in the same right, in favor of all the plaintiffs, and against all the defendants. A plaintiff cannot

[1] 3 Black Com. 118.

[2] Watson *v.* Howard, 3 C. R. 218. Per EDWARDS J.

[3] 3 Black. Com. 139, 4 How. Pr. R. 234.

sue two defendants on a joint contract, and unite a claim on a separate contract against one of them. And see, further, the preceding chapter as to the joinder of parties.

The causes of action so joined, must not require different places of trial. Thus, in an action to recover real estate situated in one county, a claim to recover lands in another county, cannot be joined, because actions to recover real property must be tried in the county where the land is situated.[1] So, also, in an action to recover personal property distrained; actions against public officers, &c., &c.

The actions so united must also be *separately stated;* and it has been held, that unless so stated the complaint may be demurred to.[2] The late rules of the Supreme Court require also that they shall not only be separately stated, but *plainly numbered.*[3] A neglect to comply with the rule, though not, perhaps, a proper ground of demurrer, would be an irregularity, which the Court would correct on motion.

The separate statements of different causes of action, required by the Code, is equivalent to separate counts under the old system, and each cause of action must be distinctly set forth by itself.[4] Thus it was held different causes of action in slander, as for words alleged to have been spoken of the plaintiff in one place, and words alleged to have been spoken of him

[1] Am. Code, § 123.

[2] 2 C. R. 145. But see further on this subject, post, chap. vii. sec. 2.

[3] Rule 87. The Rule applies to answer and reply, as well as complaint.

[4] Pike *v.* VanWormer, 5 How. Pr. R. 171. Per Willard J.

in another, could not be joined, unless each distinct slander was separately stated by itself in a separate count.[1] The same doctrine was held by the same Justice in Durkee *v.* Saratoga and Washington Railroad Co.[2]

In that case the plaintiffs united three substantive grounds of injury, viz., one for the building an embankment on the defendants' own land; one for building an embankment on the highway near the plaintiff's store; and a third for erecting an embankment on the plaintiff's land. The injuries were not separately stated but blended together, and judgment was rendered on that ground for the defendants on demurrer.

But the Code does not require or permit the severing of a single cause of action. Thus in an action for the negligence of the defendant, it has been held in a late case at Special Term,[3] that the complaint might properly set forth in one statement allegations of injury to both the property and person of the plaintiff. The ground of the action was the negligence, and all the injuries resulting from the act of negligence constituted but a single cause of action. The court says in that case, "the legislature, in using the term, '*several causes of action*,' in this section must have had reference to the causes of action as they were then founded, limited, and defined by the common law; for there was no other resort to ascertain what constituted a cause of action." This agrees

[1] 5 How. Pr. R. 171. [2] 2 Code R. 145. 4 How. Pr. R. 226.

[3] Howe *v.* Peckham, 6 How. Pr. R. 229. 10 Barb. S. C. R. 656 per Mason J.

in the main, with what was said by JUSTICE HARRIS in Enos *v.* Harmon,[1] that the Code "has not changed the rule as it previously existed by which to determine what causes of action might and what might not be joined, although it had changed the classification of actions. Now, as before, the causes of action to be joined must be in favor of all the plaintiffs and against all the defendants, and must all belong to the same class."[2]

The several causes of action must be separate and independent claims, and not the *same* claim stated in different forms like the different counts in a declaration. In a case at Special Term in the third District,[3] this was held *unnecessary repetition* and bad pleading, and a motion was granted to strike out all but one statement, or compel the plaintiff to elect by which he would abide.

It was very correctly remarked in a case decided before the last amendment,[4] that the commissioners probably had in view actions at law merely, and not equitable actions, when they framed section 167. The nature of these actions was well understood and their character well defined. There cannot be, therefore (independent of the difficulty arising from subdivision 1, which has just been noticed,[5]) much difficulty in determining what actions may be joined under each

[1] Ante, page 107.

[2] But query, how far this rule is now changed by the late amendment, and see exceptions noticed, post, chap. vii. sec. 2.

[3] Stockbridge Iron Co. *v.* Mellen, 5 How. Pr. R. 439.

[4] Durkee *v.* Saratoga R. R. Co., 4 How. Pr. R. 226.

[5] Ante, page 123.

of the other subdivisions, and as the subject will be again incidentally treated of in the chapter on the demurrer,[1] it will not be necessary longer to dwell upon it here.

It should be observed, however, that there is a large class of actions in which relief was formerly administered on the equity side of the court, which do not strictly belong to either one of these subdivisions, and for the joinder of which, therefore, the Code prescribes no rule. Such are actions for divorce; to correct mistakes in written instruments; to set aside a deed for fraud; to establish a trust, &c. &c., and generally most of the various species of claims for equitable relief. It would be too much to say, on the one hand, that, because the Code is silent, no two of such causes of action can be joined in one complaint, or on the other that, for the same reason, the plaintiff might join as many as, and what he pleased, no matter how dissimilar and incongruous they may be, as for example, an action to set aside an assignment for fraud, with an action against assignor and assignee to foreclose a mortgage. On the contrary, the rule is otherwise; and the plaintiff, it is believed, may unite with each other, several causes of action, not properly classified under either of the seven subdivisions of section 167, in the same manner, and to the same extent, as he formerly might do in the same class of actions in equity. And see farther as to what causes of action may be so united, and what is multifariousness, and when a misjoinder is demurrable, post, chap. vii. section 2.

[1] Post, chap. vii. § 2.

Although, as above remarked, it is now settled that legal and equitable causes of action may be united in the same complaint, yet this seems to be proper only in that class of cases where both causes of action can be referred to one of the subdivisions of section 167, and also subject to the limitations in such section, that such causes of action must affect all the parties, and not require different places of trial, and the further limitation that they be consistent with each other.

CHAPTER IV.

OF THE COMPLAINT.

THE first pleading on the part of the plaintiff is the complaint.[1] This is a substitute at once for the old chancery complaint in a suit in equity, and for the declaration in an action at law.

A declaration under the old system was defined to be a specification in a *methodical and legal form* of the circumstances which constitute the plaintiff's cause of action.[2] The most important requisites of the declaration were, 1st, that it correspond with the process; 2d, that it contain a statement of *all the facts* necessary in point of law to sustain the action, and no more; and 3d, that these circumstances be set forth with certainty and truth.[3]

With the exception of dispensing with the "methodical and legal form," the Code does little more or less than re-embody these rules of the common law. It declares that the complaint shall contain:—

1st. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to

[1] Am. Code, § 141. [2] 1 Chit. Pl. 240. [3] Id. 243, 244.

be had, and the names of the parties to the action, plaintiff and defendant.

2d. A plain and concise statement of the facts, constituting a cause of action, without unnecessary repetition.

3d. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.[1]

Each of these requisites of the complaint will be treated of separately in this chapter, in the following order:—1st. The title. 2d. The statement of facts. 3d. The demand for relief. The two remaining sections of the chapter will consist of other matters proper to be spoken of, in connexion with the complaint, as follows:—1st. The verification. 2d. Supplemental complaint.

SECTION I.

THE TITLE.

THE complaint must contain the title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant.

[1] Am. Code, § 142.

An omission to state either of these particulars is an irregularity, which is to be corrected, it seems, not by demurrer, it not coming within any of the grounds specified as causes of demurrer,[1] but by motion to set aside the complaint for the irregularity;[2] and the plaintiff, after notice of such a motion, can amend his complaint only on payment of the defendant's costs.[3] This has been directly held in cases where no mention was made in the complaint of the county where the plaintiff desired the trial to be had.[4]

In Hill *v.* Thacter,[5] a motion was made to set aside the complaint, on the ground of irregularity, it not containing the proper title of the cause, in respect to the names of the parties; the motion was entertained and heard on the merits, but denied among other things, on the ground that the title in this respect was sufficiently set forth in the *body of the complaint.* The Code, it was said, does not specify in what part of the complaint the title shall be found.

It is said, however, that in a court of limited jurisdiction, where the trial can be had in only one county, a complaint will be good, though it omit to specify the name of the county.[6]

If the name of the court be omitted, the objection, it is presumed, will be taken the same way, namely, by motion to set aside the complaint for the irregu-

[1] By § 144; see also post, chap. vii. sec. 2.

[2] Williams *v.* Wilkinson, 1 C. R., N. S. 20.

[3] Hall *v.* Huntley, 1 C. R., N. S. 21.

[4] Id.

[5] 3 How. Pr. R. 407, 2 C. R. 3.

[6] 1 Code Rep. 39.

larity. A demurrer by the Code is allowed where the complaint does not state "*facts sufficient to constitute a cause of action.*" This is, of course, not such an omission as can be taken advantage of by demurrer.[1]

The title, it seems, must set forth correctly the names of the parties plaintiff and defendant. Their full names, both christian and surname, should be stated; and apartnership consisting of several persons must sue or be sued by their names at length, and not in the name of the firm.[2] Thus A. B. and Co. *v.* C. D., in the title of a complaint, would be bad, unless, indeed, it was cured by the names being correctly set forth in full in the body of the complaint within the decision in the case of Hill *v.* Thacter, supra. If the plaintiff sue or the defendant is sued in a particular character, it should be so expressed in the title; as A. B., executor of the last will and testament of C. D., deceased; A. B., committee of the person and estate of C. D., a lunatic; A. B., president of the Bank of ———, &c. And further in respect to the parties in the title of the complaint the reader is referred to what was said, ante, chap. ii. on *parties to the action.*

By section 175,[3] when the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

[1] See 4 How. Pr. R. 154. 5 id. 234, 241.

[2] 3 Caines, 170. 8 T. R. 508. [3] Am. Code.

In such case the plaintiff should set forth such a description of the person of the defendant as he is able to give, and should show particularly his interest in, and connection with, the action.

In a partition suit, if any of the parties are unknown, the statute authorizes the plaintiff to proceed against such "owners unknown," and, of course, their names need not be set out in the title.

SECTION II.

THE STATEMENT OF FACTS.

THE original Code provided that the complaint should contain:

> A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.[1]

As amended in 1851 it is as follows:

> A plain and concise statement of the facts constituting a cause of action without unnecessary repetition.[2]

It will be seen at a glance that the amendment does not substantially alter the section as it originally stood; the decisions, therefore, that have been made

[1] § 120, Original Code, 2d sub. [2] § 142 Am. Code, 2d sub.

under the original Code are equally applicable to the Code as thus amended.

A careful consideration of this important branch of the subject will render it necessary to enter into a full and perhaps minute examination (even at the risk of repeating a portion of what has already been said[1]) of the cases that have been decided and reported since the Code, in order to ascertain what is a sufficient statement of "*facts constituting a cause of action*" within the meaning of the Code, and what are the principles and rules which govern such statement.

It has been observed that the old declaration at law was but a mere statement of facts "constituting the plaintiff's cause of action, *in methodical and legal form.*" The Code, it seems, dispenses with both the *method* and the *form*, but it retains the substance; as is well remarked by JUSTICE HAND, in Boyce *v.* Brown,[2] "The pleader may use his own language, but the *necessary matter* must be there, and be stated in *an intelligible and issuable form, capable of trial.*" In the same case the same Justice remarks: "All that I mean to say now is, that, as a general rule, a pleading, to be good by the settled principles of pleading, as modified by the Code, must state the facts constituting a legal cause of action or ground of defence; and these should be set forth in a plain, direct, definite, certain, and traversable manner. Any number of facts constituting one cause of action, or one defence, may be combined; but each

[1] Ante, § § iii and iv. chap. 1.

[2] 7 Barb. S. C. R., 81.

cause of action, and each defence, should be stated separately, and then they will be capable of trial."

These general principles and rules apply to all kinds of pleading under the Code—that which has heretofore been denominated equitable, as well as legal. The rules which tested the sufficiency of a bill in chancery *for relief* (not for discovery) were similar to those which tested the sufficiency of a declaration at law; the pleader must state his client's cause of action in such a manner that the main facts upon which his right to relief depends may be put in issue and tried.[1]

It was said by Mr. JUSTICE WILLARD, in a case arising under the original Code,[2] that if the pleading in that case were to be tested by any rule of pleading which existed prior to the Code, it could not be upheld for a moment, being argumentative, contradictory, absurd, double, inconsistent, uncertain, incongruous, and, in many particulars, wholly unintelligible. "By the 118th section of the Code,[3] all the forms of pleading heretofore existing are abolished, and hereafter the forms of pleading in civil actions, and the rules by which the sufficiency of the pleading is to be determined, are those prescribed by the Code of Procedure. We must, therefore, not look to those rules which have sprung from past experience and the wisdom of ages to determine its character, but to the rules prescribed by the Code." And, as was

[1] 4 John. Ch. 437. 3 Paige, 608. See ante, pages 65, 66.

[2] Boyce v. Brown, 3 How. Pr. R. 391, S. C. at General Term, 7 Barb. S. C. R. 81.

[3] The same as § 140 as amended in 1852.

ever, which is an *essential fact* necessary to support an action on contract. This was so held under the Code in Bristol *v.* Rensselaer & Saratoga R. R. Co.,[1] in which the plaintiff complained against the defendants as common carriers for non-delivery of goods, without alleging that they did, or were to, receive any compensation for carrying the goods, and the agreement, therefore, it was said, was to be regarded as made without consideration.

The complaint must show a consideration whenever proof of it is necessary to support the action;[2] and if such consideration be not set forth, it cannot be proved, and the action will fail.[3] Mutual promises must be stated to have been made at the same time. That in consideration of the plaintiff's promise the defendant "afterwards promised," &c., is bad.[4]

The consideration stated must be legally *sufficient.* If it be frivolous, or void, or illegal, the complaint will be bad on demurrer, as not stating facts sufficient to constitute a cause of action. A mere moral obligation, as we shall presently notice more at large, will sustain a promise, and such a consideration appearing in the complaint will be sufficient.

As to the consideration of a note, bill, or bond.—In declaring upon bills of exchange and promissory notes and some other written instruments, and liabilities, the mere statement of the liability which constitutes the consideration is sufficient. A negotiable promissory note, or bill, of itself imports a considera-

[1] 9 Barb. S. C. R. 158, General Term, 4th District.

[2] 4 John. 280. [3] 9 Barb. S. C. R. 158.

[4] 1 Caines, 583. 12 John. 209.

tion. No consideration need be proved on the trial, and none, therefore, need be alleged in the complaint. This doctrine is supported also by numerous authorities[1] and is so held under the Code.[2] But if the instrument on its face do not disclose a consideration, then a consideration must be averred and proved,[3] as in complaining on a note not within the statute, and expressing to be for value received; but it is sufficient to state that it was given for value received, without averring a special consideration.[4] Though, it was held, that if the plaintiff undertook to set forth the consideration specially, he was bound to prove it as laid.[5] This is now, doubtless, otherwise under the system of amendments allowed by the Code. Such a variance, unless proved actually to have "misled" the opposite party, would be disregarded on the trial.[6]

It is held to be sufficient in a complaint to allege that on a certain day and at a certain place, the defendant by his promissory note in writing, for value received, promised to pay the plaintiff, or bearer, a specified sum; that he has not paid the same, and is indebted to the plaintiff therefor, although there is no allegation that the defendant delivered the note; when it was payable; whether due or not; or that the plaintiff was the holder and owner thereof.[7] The words for value received, import a consideration as between endorser and endorsee, and in a complaint thereon, the complainant who alleges himself to be

[1] See cases in 1 Chit. Pl., note 1, page 293.
[2] 7 L. O. 149. [3] 2 McCord, 218. [4] 7 John. 321. 10 id. 418.
[5] Id. [6] See post, chap. ix. sec. 2.
[7] 6 Barb. S. C. R. 662.

the lawful holder, need not aver or prove a consideration.[1]

Upon similar principles a complaint on a sealed instrument need not aver a consideration,[2] because a consideration need not, in the first instance, be proved. It is sufficient to say that the defendant executed and delivered such an instrument under his hand and seal to the plaintiff, without averring or proving a consideration.

Other averments in actions on notes and written instruments.—In an action by endorsee against the endorser, it has been held that an averment of protest of the note is necessary to charge the endorser.[3] In such a suit it is necessary to prove a presentment and demand at the *place* specified in the note for payment.[4] And if payable at a particular bank, the demand must be alleged and proved to have been made at the bank; an averment that the demand was made of the cashier is not sufficient.[5] Before the Code, therefore, it was necessary that these facts should be specifically averred in the pleading. But since the Code it seems a general statement that the note was "duly presented," and "duly demanded," is sufficient under section 162, which dispenses with the necessity of pleading the facts, showing the performance of a condition precedent in a contract.[6]

It is necessary, however, to show that the party bringing the suit is the lawful holder or owner of the note. A complaint by endorsee against endorser,

[1] 1 Code R. 119. [2] 4 John. 416.
[3] N. Y. Com. Pleas, 1 C. R. 102, 7 L. O. 23.
[4] 17 John. 256, 11 Wheat. 171. [5] 19 John. 419.
[6] Gay v. Paine, 5 How. Pr. R. 107, per GRIDLEY J.

averring merely an endorsement in blank by the payee, but without alleging that the plaintiff was the lawful holder of the note, was held in the New York Common Pleas to be defective.[1]

The same court held that a mere allegation that the plaintiff was the lawful holder of the note without averring that the note was endorsed by the payee to the plaintiff was insufficient, the allegation being a mere conclusion of law.[2] But see case of Lord *v.* Cheesborough,[3] in the Superior Court of N. Y., which intimates that such an averment would be sufficient without alleging an endorsement over to the holder, or other facts going to establish the ownership. If the suit be brought directly by the payee against the maker, it is held even unnecessary to allege that the plaintiff is the owner or party in interest, or that the note is due, or when it is payable by the terms of it; to say that the defendant is indebted and promised is sufficient. So held at Special Term in Peets *v.* Bratt, on demurrer.[4]

The plaintiff is required to prove, in a suit on a promissory note: 1st, the identity of the note; 2d, his interest in it; 3d, that the defendant is a party to it; 4th, that the defendant has not performed his contract.[5] The possession of the note is *primâ facie* evidence that it is not paid.[6] So, too, it is of ownership, even where there is no averment of ownership

[1] Per INGRAHAM J., Hoxie v. Cushman, 7 L. O. 149.
[2] Vanderpool *v.* Tarbox, 7 L. O. 150.
[3] 4 Sand. 696. 1 C. R., N. S. 322.
[4] 6 Barb. S. C. R. 662.
[5] Giesson *v.* Giesson, 1 C. R., N. S. 414. [6] Id.

in the complaint, and the answer does not set up such a defence.[1]

Copy of written instrument when sufficient complaint. —It has been thought that the law in respect to the form of complaint on all written instruments for the payment of money, will become obsolete by the amendment to section 162 of the Code, which is as follows:

"In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum which he claims."

It is, however, erroneous to suppose that this clause of the Code makes a mere copy of the note, or other written instrument, in all cases a sufficient statement of a cause of action. Enough must also appear on the face of the complaint to show that the present plaintiff has a right to maintain the action against the present defendants. The plaintiff's interest in the note is an essential fact to be proved,[2] and it must be averred either *expressly*, or by *necessary implication*. If the action be by the payee in person a copy of the note will, in general, be sufficient, without accompanying it with an averment to show plaintiff's ownership, or interest, within the principle of Peets *v.* Bratt, supra;[3] and should the defendant wish to show in his defence that the plaintiff has parted with his interest in the note, he must allege such fact on his

[1] 7 L. O. 149.

[2] 1 C. R. N. S. 414.

[3] 6 Barb. S. C. R. 662.

part in his answer. Possession of the note, as we have seen, raises the presumption of ownership sufficient to make out a *primâ facie* case to sustain the action, which, however, under such a state of pleadings, the defendant would be at liberty to disprove.

But the case is different if the right of action has vested in, and the suit is brought by a third person. The question came up in the Superior Court, in Lord *v.* Cheesborough,[1] as to the effect of this amendment to the Code in such a case; and it was held that, in a complaint on a written instrument, where the plaintiff is not the party to whom the instrument was made payable and delivered by the defendant, the complaint should show, by some suitable allegation, the plaintiff's right to sue thereon. In that case, the holder of the note sued the makers, setting forth a copy of the note drawn by the defendants, payable to their own order, and endorsed by them in blank, and claiming as due thereon a specified sum. JUSTICE SANDFORD, in his opinion in that case, says:—"It is said that section 162 is intended as a substitute for the statute allowing parties to sue the several parties to bills and notes by a declaration containing only the common money counts, with a copy of the bill or note sued on attached to the declaration; but we do not see the analogy, nor how it helps the plaintiffs. That statute made no change in the form of pleading. It seems to us that the complaint in this case is defective in not showing, by some appropriate averment, the transfer of the note in suit to the plaintiffs, or that they are the lawful holders and owners of the note;

[1] 4 Sand. 696, 1 C. R., N. S. 322.

and we think that it was competent to the defendants to traverse as they have done the transfer of the note to the plaintiffs and their ownership."

The propriety and good sense of this construction of the statute must be apparent. It is presumed, if the note, instead of having been endorsed in blank, had been endorsed to the plaintiff, a copy of such endorsement would have been a sufficient averment or suggestion of the plaintiffs' interest and right to maintain the action within this section of the Code and the cases already cited. So, too, in cases of executors and others not suing in their own right; an averment or suggestion should be made of facts sufficient to make the executor's interest in the action appear on the face of the complaint, so that the record may show that the recovery was by the executor as such, upon the note of his testator.

These principles have been well understood and applied by the courts of one or two sister States under similar statutes. In Indiana, in a suit entitled in the name of an executor, a promissory note given by the defendant to the testator, filed as the cause of action, was held to be insufficient under a statute authorizing the filing of a note or other written instrument as a sufficient statement of the plaintiff's demand. The Supreme Court of that State held that the mere description of the plaintiff's person, as executor in the title of the suit, was not enough to show his connexion with the demand. There should have been an averment to show his interest in the note.[1] So in a suit by husband and wife on a note payable to the wife

[1] 6 Black. Ind. R. 88.

before marriage, a copy of the note is not of itself a sufficient statement of demand without an averment of her marriage with the co-plaintiff.[1] So on a note of a firm, signed in the partnership name, the complaint should contain the names at length of the firm, with an averment that such parties compose the firm, it being said by the court, that "the statute dispenses with a formal declaration, but it does not dispense with parties to a suit."[2] The general rule under the statute in that State seems to be, that whenever a written contract is filed as a statement of the cause of action, a want of an averment of facts connected with the contract, and necessary to be proved on the trial, is not a fatal objection, if enough be stated *to bar another suit for the same demand.*[3] Or, as the rule was laid down in a very early case:[4] "No action can be supported for any demand whatever, unless the demand is so far identified by description as to be distinguishable from any other demand of like nature. Its most prominent features must be delineated, so as to be known wherever they make their appearance; *that one recovery may bar every future attempt to enforce the same demand.*"*

[1] 4 Black. Ind. R. 174.

[2] 3 Id. 322.

[3] 6 Black. Ind. R. 184.

[4] Bond *v.* Paterson, 1 Black Ind. R. 38.

* NOTE.—It is to be remarked that these decisions are all on suits arising in Justices' Courts; the Courts of Record in that State still following the old common law rules of pleading. The statute regulating pleading in Justices' Courts is substantially the same with our Code. It provides that the plaintiff shall "file with the Justice *a concise statement, in writing, of his cause of action*, or the nature of the wrong or injury of which he complains, if it be founded on

Statement of defendant's promise or contract.—Not only was a consideration necessary to be shown in an action of *assumpsit*, but the declaration was also required to show in all cases that a *promise* had been made. The word *promised*, or something equivalent thereto, must, it seems, be in the declaration, or it would be held bad on demurrer, and even *after* verdict and judgment.[1] No distinction existed, in pleading, between an *implied promise* and an *express* one; and though, as regarded *evidence*, the law in many cases implied, from certain facts, that a promise had been made, yet in pleading the supposed promise itself was alleged as the fact.[2]

This rule was attempted to be very strictly applied under the Code, in the case of Dollner *v.* Gibson,[3] which will presently be more particularly noticed. It seems, however, impossible to sustain that case, as a rule of pleading under the Code, either on authority or principle.[4] The true rule is undoubtedly laid down by JUSTICE SILL, in Glenny *v.* Hitchings,[5] that the *facts* which in *evidence* raise the implied promise are to be stated, and not the mere legal inference.[6]

It was held in the last case not to be necessary to

tort; and in actions founded on contract, the account, note, bill, bond, or other statement in writing, of the nature of the demand on which he intends to rely." The above decisions, therefore, are not inapplicable to our Code.

[1] 10 Wend. 487. [2] 1 Chit. Pl. 301.

[3] 3 C. R. 153, per EDMONDS J.

[4] Post, page 148. [5] 4 How. Pr. R. 98.

[6] See also opinion of ROOSEVELT, J., in Manning *v.* Whitbeck, cited in subsequent part of this chapter.

aver in a complaint for goods sold and delivered, a *promise* to pay by the defendant. The *sale* and *delivery*, it was said, were the issuable *facts*, and the defendant's promise to pay, was a mere legal inference from the facts, which if controverted would form an immaterial issue. This rule may safely be applied to all other cases. If there be an *express* promise which the plaintiff expects to prove, it is a *fact* proper to be alleged. If the promise be *implied*, that is, if it be a mere legal inference from certain facts, the facts themselves and not the promise, should be alleged.[1]

It is not necessary when the contract is in writing to state that circumstance in the declaration. Nor even, if the action be upon a promise within the statute of frauds, is it necessary to aver the contract to be in writing.[2] A complaint averring a promise by parol will be supported by a promise in writing.[3] But such fact may be, and probably under the Code, should be, alleged, as it will not only save time, but serve to narrow down the issue to some specific and definite point of controversy.

In applying the rule that facts must be stated and not mere inferences or conclusions of law, a confusion sometimes arises by a failure to draw the line of distinction between it and that other rule which has been also applied to pleadings under the Code, namely, that *facts are to be pleaded according to their legal effect or operation.*[4] This question has already been inci-

[1] See this question more fully considered, in a subsequent part of this chapter, under the head of "*Common Counts.*"

[2] 15 John. 425; 6 Hill. 33. [3] 13 John. 175.

[4] 8 Barb. S. R. C. 252. 7 Id. 80. 3 Code. R. 153.

dentally noticed,[1] but a word or two in addition will be necessary here.

The meaning of the rule, that *things are to be pleaded according to their legal effect or operation*, was, that in stating an instrument or other matter, in pleading, it might be set forth, not according to its tenor, but according to its effect in law. As if a joint tenant conveyed to his companion by the words "gives," "grants," &c., his estate in the lands holden in jointure, this, though in terms a *grant*, is not properly such, in operation of law, but amounts to that species of conveyance called a *release;* it should therefore be pleaded, not, that he *granted*, but that he *released*.[2] The rule in question was, in its terms, often confined to deeds and conveyances; it extended, however, to all instruments and contracts, written and verbal, and indeed it may be said generally to all matters or transactions whatever, which a party may have occasion to allege in pleading, and in which the form is distinguishable from the legal effect.[3]

This rule, as has been already observed, was very strictly applied in the case of Dollner *v.* Gibson, cited supra.[4] In that case the plaintiffs, instead of alleging that they sold and delivered certain merchandize to *the defendants*, alleged that they sold it to one A. M. for and on behalf of the defendants, and that said A. M. acted as agent for the defendants, &c. A motion was granted to strike out from the complaint all that related to the agency, the court holding that

[1] Ante, page 146.

[2] 2 Saund. 97. 4 Mad. 150.

[3] 1 Salk. 8 Steph. Pl. 390, 1 Chit. Pl. 304, 306.

[4] 1 C. R. 153, cited ante, page 146.

the act of the agent was to be pleaded as the act of the principal, that being its *legal effect.* In other words, that the party in such case not only *might*, but *must*, plead the legal conclusion or effect of the facts, instead of the facts themselves, even if he desired to verify the pleading. This was applying a more technical rule to pleadings under the Code than had previously, or it is believed, has since been done. It is, however, difficult to see how this case can be sustained,[1] or in what manner such a rule can be made applicable to pleadings under the Code. Even under the old system it was not in all cases rigorously applied. This form of pleading was rather optional than compulsory. "The party," says Mr. Chitty, "is not *compelled* to follow the precise form of words in which the contract was made; it *suffices*, if he state its true legal effect and operation."[2] Thus, though a written contract or deed should be pleaded, not according to its terms, but its legal effect or operation,[3] yet, if the party chose, it *might* be pleaded *in hæc verba*, and where the meaning was doubtful, it was advisable to do so in order that the court might construe it.[4] The rule alluded to, it has been well said, is a very good rule as a rule of brevity, but a very bad one as a rule of certainty. "It is really a rule of uncertainty, since it continually introduces the discussion of the question, *What is the legal effect of such things?*"[5] Thus in the case alluded to above[6] it was said that on

[1] The case is said to have been reversed at the General Term.

[2] 1 Chit. Pl. 304. See also 4 Wend. 549. 9 id. 135. 8 Cow. 36. 10 Mass. R. 230, 320.

[3] 2 Hill, 274. 8 Cow. 36. 2 Wend. 479.

[4] 6 Hill, 476.

[5] Evans on Pl. 188.

[6] Dollner v. Gibson.

a sale and delivery of goods, even when *there was no express promise* to pay for them, a promise was always pleaded, that being the foundation of the action, and the *legal effect* of the fact of the sale; and the sale and delivery were pleaded merely as the consideration of the promise. But in the case of Glenny *v.* Hitchings,[1] on the other hand, it was said that the promise was an *inference* or *conclusion of law* from the facts, showing a sale and delivery of goods, and that it was neither material nor proper to set forth such a promise in the complaint. And the rule is well settled, even under the Code, that conclusions of law cannot be stated, but the facts from which such conclusions are derived; though perhaps this rule was carried farther than was necessary, in the case of Vanderpool *v.* Tarbox in the New York Common Pleas,[2] wherein it was held that a general allegation of the plaintiff being *the lawful holder* of a promissory note, without showing an endorsement to the plaintiff was bad as stating a conclusion of law. The difficulty in the application of both rules seems to be in discriminating between what are strictly *conclusions of law*, which cannot be stated, and what the *legal effects of the facts* which *may* be stated, instead of the facts themselves.

It seems, therefore, that the rule that facts *must* be set forth according to their legal effect, is not properly applicable under the Code, or at least will not be more strictly enforced than under the old system, and therefore the pleader will, in all cases of doubt, be at liberty to state "*the facts* constituting

[1] 4 How. Pr. R. 98.

[2] 7 L. O. 150.

the cause of action," instead of undertaking to give their legal effect, and as in the case of pleading a written instrument, leave it to the court to construe them.

I am the more confirmed in this view by the authority of the case of Manning *v.* Whitbeck,[1] in the Supreme Court, lately decided,—and what was said in Eno *v.* Woodworth, a reported case, in the Court of Appeals.[2] In the first of these cases the pleadings, as stated in the opinion of the court, were as follows:

The plaintiffs, in their complaint, which was verified, alleged that they were the owners of a quantity of merchandize, describing the articles particularly, and the value. That the defendants illegally and unjustly detained this property from, and refused to restore it to, the plaintiffs; and that the plaintiffs, therefore, demand a judgment of delivery and costs. The defendants alleged that the complaint was not true, but, on the contrary, that the goods were some time before sold and delivered to one of the defendants, and that after he had disposed of a portion of them, the residue were lawfully taken on an execution against him by the other defendant, as sheriff, &c. It seems in this case to have been conceded that the plaintiffs, in swearing to their ownership of these goods, and to the alleged wrongful detention by the defendants, were merely dealing in conclusions of law. They relied, it seems, on the fact that although

[1] I do not find this case officially reported. The able and conclusive opinion delivered in the case may be found in No. 1, "Law Reform Tracts," p. 18.

[2] 4 Coms. 349.

it was true that the goods were sold and delivered, yet the plaintiffs were deceived by false and fraudulent representations, constituting a ground in law to annul the sale. This was carrying out to the letter the doctrine that facts *must* be pleaded according to their *legal effect.*

JUSTICE ROOSEVELT, who delivered the opinion in the case, very pointedly repudiates the doctrine that facts must be set forth according to their legal effect, and with great clearness and force gives his reasons. He says: "In the first place, then, we are to inquire what, in this law,[1] or in common acceptation, is understood by the term *facts.* It certainly excludes all the ancient fictions, in which the black-lettered law and the black-lettered lawyers at one time so much delighted. Fact is the opposite of fiction. Requiring the one is rejecting the other. Besides, the statement of these facts and matters was to be sworn to; a condition only to be complied with on the supposition of truth. The people generally, and especially those who had been in the habit of serving on juries, and, I may add, a large portion of the profession itself, had become disgusted with the old system of legal falsehoods; and the Code, in the particular in question, was but the expression of an almost universal public sentiment. Not satisfied with directing the written pleadings of the parties to be plain and concise, in other words stripping them of their prolixity and obscurity, it enacted that they should be true. Of what avail, however, is this provision, if parties are to be *allowed*, and not only allowed, but

[1] §§ 142, 149, Code.

required, while discarding open, admitted, fictions, to deal in the far more dangerous practice of making oath to legal conclusions?" The conclusions arrived at by the learned judge, and his decision on the motion, which was by the plaintiff to strike out as irrelevant these matters of fact, "which must form the real issue," alleged in the answer, are as follows: "I conclude, then, that the plaintiffs, instead of striking out the matters of fact set up by the defendants, should themselves have fully stated the whole case in their complaint; and that not having done so, they must now bring forward the alleged fraudulent representations, if such be in truth the foundation of their claim, in the form of a reply to the new matter stated in the defendant's answer."

These views are sustained by what was said by JUSTICE BRONSON, in the other case above alluded to, Eno *v.* Woodworth, in the Court of Appeals.[1] In that case it was held that money paid under a contract to convey land, void for want of mutuality, could be recovered back in an action for money had and received. In respect to the form of the pleadings in such an action, JUSTICE BRONSON says:

"It is true that the pleader has stated the written agreement and all the facts necessary to show a right to recover upon it if it is valid. But it is also true that the same facts establish a right to recover back the money, if the agreement is void. This is an action under the Code, and the whole case is set forth in the complaint. Upon the case as it is stated in the complaint, and has been found by the jury, the

[1] 4 Coms. 247.

plaintiff is entitled to recover, whether the written contract is good or bad; and the defendant cannot defeat the action by giving it a name, or because the pleadings do not conform to the old precedents. *It is questionable whether it would be good pleading under the Code to follow the old form, and say, that the defendant was indebted to the plaintiff in a certain sum, for so much money had and received by the defendant to the plaintiff's use. The more proper course would seem to be that which the plaintiff has adopted, of stating the facts which show that the defendant has received money which belongs to the plaintiff.*"

And in a late case in the New York Superior Court,[1] JUSTICE DUER says: "Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred; and *every such averment must be understood as meaning what it says*, and consequently is one to be sustained by evidence which corresponds with its meaning."

Common Counts.—The rule of pleading, namely, that *the facts* must be stated, and neither the legal conclusion, nor the legal effect of the facts, may now be safely applied to all cases where the action is for a common debt, or money demand arising on contract, and in which heretofore the *common counts* as they are called, were used; as,

For goods sold and delivered, or bargained and sold.

For work and labor done.

For money had and received to the plaintiff's use.

[1] Glancy *v.* Fowler, 4 Sand. 667.

For money paid, laid out, and expended for the defendant.

For money lent.

For use and occupation, &c.

The common counts were founded on express or implied promises to pay *money* in consideration of a *precedent* and *existing* debt.[1] They were of four descriptions. 1st. The *indebitatus* count. 2d. The *quantum meruit*. 3d. The *quantum valebant*. 4th. The account stated.

The *indebitatus* count stated generally that the defendant on a day named was *indebted* to the plaintiff in a named sum of money for goods sold, or labor, or for money lent, paid, or had and received, or for some other pre-existing debt on simple contract, at the defendant's *request*, and that being so *indebted*, the defendant, in consideration thereof, *promised* the plaintiff to pay, &c., and then the common breach, that the defendant, although requested, had neglected and refused to pay, to the plaintiff's damage, &c. The *indebtedness*, accruing at the defendant's *request*, the *cause or subject matter* thereof, and the *promise* to pay, constituted the essence of the *indebitatus* count.

The *quantum meruit* and *quantum valebant* counts were in a different form; the first alleging *a promise* on the part of the defendant to pay as much as the plaintiff *reasonably deserved to have*, and the second a like *promise* to pay as much as the thing was *reasonably worth*. The account stated, also alleged

[1] 1 Chit. Pl. 340.

a *promise* on the part of the defendant on an accounting to pay the balance found due.[1]

These various *promises*, *requests*, &c., thus alleged as the basis of the common counts, were scarcely anything more than mere legal fictions. They were almost always matters implied by law, not requiring any express proof. In pleading, there was no difference between an express and an implied promise.[2] Both were stated affirmatively and positively, and the latter was supported by proof of a state of facts from which the law drew the inference of a promise. Thus in the case of Eno *v.* Woodworth,[3] above cited, if the plaintiff desired to recover back the money paid by him, on the failure of the defendant to fulfil the written agreement entered into, he would, under the old system, have declared on the *indebitatus* count, for money had and received by the defendant to the plaintiff's use at the defendant's *request*, alleging a *promise* to pay. The defendant, in point of fact, never requested him, and never made a promise; and none would have been proved on the trial; but simply a state of facts, from which a request and promise might be *implied in law*, and which entitled the plaintiff to recover. It is, in reality, as much a fictitious mode of pleading as was the manner of stating a case in trover, namely, that the plaintiff *casually lost* a chattel, and that the defendant *found* it; the fact alleged was never really to be proved, but only a state of facts, from which, as a matter of law, the *losing* and *finding* were *implied*. This method of

[1] 1 Chit. Pl. 341.

[2] 1 Chit. Pl. 340 n.

[3] 4 Com. 247.

pleading does not seem, within the decisions last cited, adapted to the genius and spirit of the Code, which requires "the facts" to be stated, not conclusions, inferences, matters implied in law, or the legal effect of facts. It was a mere technical rule of pleading which permitted (but did not absolutely require) an implied promise to be pleaded as an express promise; and these technical rules of pleading, as we have seen, are abolished by the Code.

Indeed, even under the old system, the facts constituting the cause of action *might* be stated; that is to say, a special declaration used in cases where the common counts were also proper;[1] and in many cases for the sale of goods, for money had and received, for work, labor, and services, the common counts could not be used, but the plaintiff must declare specially on the facts constituting his cause of action.[2]

It is not, however, meant to be here said that a cause of action under the Code, set forth substantially in the form of the old *indebitatus* count, would not be good, nor was this so held in Eno *v.* Woodworth. All that is meant is, that, under the Code, it is not necessary, nor is it believed to be proper, to allege in a pleading an *implied* request, or an *implied* promise, or any other matter *implied by law*, either as the foundation of the action or as ancillary thereto. The facts raising the implication, and they alone, should be stated, because they alone are to be proved. The

[1] Formerly these general counts were not in use; and Lord Holt is said to have remarked, that he was a bold man who first ventured on them. 1 Chit. Pl. 342.

[2] See cases collected 1 Cow. Treat. pp. 126 to 155.

cases of Tucker *v.* Rushton,[1] Manning *v.* Whitbeck,[2] and Glenny *v.* Hitchings,[3] were undoubtedly decided on correct principles. In the latter case, it was alleged merely that the plaintiff *sold and delivered* to the defendant certain goods, describing them, to the value of a certain sum, and claimed judgment in a specified amount. There was neither a *request* on the part of the plaintiff nor a *promise* by defendant alleged; and a demurrer, on the ground that the complaint did not allege a promise or any legal liability on the part of the defendant, was very properly overruled. In the former case the complaint alleged an indebtedness, and also that the plaintiff claimed a certain sum for the use and occupation of certain rooms for a specified time at a specified price, and also for articles furnished by plaintiff to defendant. This, also, was held sufficient.

The rule, therefore, under the decision in Eno *v.* Woodworth, and Manning *v.* Whitbeck, cannot longer be of very difficult or doubtful application. In all cases where the money counts heretofore might have been used, the plaintiff may still set forth his cause of action in this form, if it expresses *the fact* necessary *to be proved* in order to fix the defendant's liability; as, for example, if he has actually performed work and labor for the defendant, with his assent; or has actually sold and delivered him goods which have come to his hands, and have been used by him; or has lent him money which he refuses to pay, &c., &c., leaving out, however, those legal fictions of a

[1] 2 C. R. 59, 7 L. O. 315.

[2] 4 How. Pr. R. 98.

[3] Ante, page 151.

request or *promise*, which the law implies from the essential fact of the sale and delivery, the labor done, or the money lent. If the labor has been done, or the goods delivered, at the *express request* of the defendant, it should be so alleged, and proved, as it will save the necessity of alleging and proving other facts tending to show that the labor was not *gratuitous*, or the goods were not delivered without *the knowledge or assent* of the defendant. So, too, if there was an *express promise*, it should properly be alleged, and proved; as that the plaintiff worked one month for the defendant, and the defendant *promised* to pay him a specified sum, or that the plaintiff paid and expended certain money for necessaries, on account of the defendant, and the defendant *promised* to repay him, &c. In such case the promise is the "fact constituting the cause of action" which is to be proved in evidence, and the labor or the money expended, the consideration to support it. Where there is an *express* promise to pay, the promise itself, having a sufficient consideration to support it, is the ground of the action, and the plaintiff need set forth no other facts to sustain his action; but in the absence of an express promise every fact necessary to fix the liability of the defendant, and to show him under a legal obligation to pay the demand, should be stated in the complaint. Such at least appears to me to be the rule indicated by the plain language of the Code, and coming within the spirit of the decisions made under it which have been heretofore cited.

In an action on a promise supported by the consideration of a mere moral obligation, as the promise

to pay a debt, from which the defendant is exonerated by a bankrupt or insolvent discharge, the new promise must be set up as the substantial cause of action, and the old debt discharged under the act, should be alleged as the consideration to support it.[1]

It has been held in several instances in this state, that in the case of a new promise to pay a debt barred by the statute of limitations, the new promise does not create a *new liability*, but merely removes the presumption of payment, and restores the remedy which the statute has barred.[2] The old debt, therefore, and not the new promise, was set forth as the cause of action. This distinction, however, was subsequently fully considered in the Court of Appeals, in VanKeuren *v.* Parmlee,[3] and declared to be without foundation. In a debt barred by the statute of limitations, as in the case of the contract of an infant, or a debt barred by an insolvent's discharge, the new promise is in the nature of a *new contract*, creating a *new liability*, and is the substantial cause of action. Hence in a complaint on a contract barred by the statute, the old demand accruing more than six years prior to the time of commencing the action, may be set up as the *consideration* of the new contract, but the *new promise* should be alleged as the cause of action. And if it be a demand barred by the statute since the Code, the new promise should be alleged to have been *in writing*, or facts averred to show some payment of principal or interest, otherwise the ac-

[1] 14 John. 148, 1 Hill 535, 4 Barb. S. C. R. 174.

[2] 5 Wend. 257, 9 Id. 293, 4 Barb. S. C. R. 168, 6 Id. 583.

[3] 2 Coms. 523.

knowledgment or promise is unavailing.[1] The rule of pleading, it is conceived, is changed, and if it distinctly appear on the face of the complaint that the plaintiff's claim is barred by the statute, or is discharged, or that the defendant at the time of the contract was an infant, and no new promise or its equivalent be alleged, or the case not brought within any of the exceptions of the statute, the complaint will be defective, as showing upon its face a state of facts which constitute no cause of action, and in analogy with the old practice in chancery the defendant may demur.[2] This was so held under the Code in the case of Genet *v* Tallmadge.[3] It will, however, be competent for the plaintiff, in the first instance, to complain on the old demand, if it can be done, without showing it barred by the statute; in which case the defence, as under the old practice, must be set up in the answer and can be taken in no other way, and unless so set up is waived.[4] I have here assumed that section 74 of the amended Code applies only to cases where the complaint shows on its face a demand *not* barred by the statute.[5]

In indicating generally the rules of pleading prescribed by the Code, it will not be necessary, nor would it be practicable, within the limits of this work, to enter into a full and particular discussion of the former requisites and qualities of pleading. The ob-

[1] Am. Code, § 110.

[2] 24 Wend. 587. 7 Paige 373, 3 Barb. Ch. R. 477. See post, chap. vii. sec. 2.

[3] 1 C. R., N. S. 346. [4] Am. Code, § 74.

[5] See post, chap. vii. sec. 2.

ject of the present chapter is mainly to inquire what changes the Code has introduced into the former mode of stating the facts which constitute the plaintiff's cause of action. I shall, therefore, without dwelling further upon these matters, in the next place briefly notice some of the *particular* provisions which the Code has made upon the subject of pleading; and first in pleading:

Conditions precedent.—The section of the Code above referred to in respect to the pleading of written instruments has made an important change in this respect. It was a general rule, subject to some exceptions, under the old system, that in pleading the *performance of a consideration or covenant*, the party could not plead generally that he performed the covenant or condition, but must show specially the time, place, and manner of performance.[1] Where a specific act was to be done by the plaintiff, or any number of acts, by way of condition precedent, he must show in pleading precisely what he has done by way of performing them.[2] The Code, however, has altered this rule, and provides that "*it may be stated generally that the party duly performed all the conditions on his part, and if such allegations be controverted, the party pleading shall be bound to establish on the trial, the facts showing such performance.*"[3]

If the performance of the condition precedent is not denied in the answer, of course no proof is necessary, for every material allegation in the complaint not controverted by the answer is to be taken as true.

[1] Steph. on Pl. 334.

[2] 24 Wend. 153.

[3] § 162 Am. Code.

Under this section it has been held that in a complaint against the endorser of a promissory note payable at a particular place, an averment of presentment and demand *at the place*, was not necessary, and that an averment that when the note became due, it was "duly presented," and payment thereof "duly demanded," was sufficient, the presentation and demand being a condition precedent in the contract, and the Code authorizing it to be stated in general terms.[1]

Private Statute.—A similar change is made by the Code in the manner of pleading a private statute. The court did not take official notice of a private statute at common law,[2] and, therefore, when a party had occasion to rely on an act of this description he must set forth such parts of it as were material.[3]

By the Code however:

"In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof."[4]

Judgment.—So, too, in pleading the judgment of an inferior court of limited or special jurisdiction, the law in this state, down to the time of the passage of the Code, was, that a general averment of jurisdiction was not sufficient, but the specific facts conferring the jurisdiction must be stated.[5] The Code has made a change in this respect similar to that made in the

[1] Ante, page 140. [2] 1 Bl. Com. 85. [3] Steph. Pl. 347.
[4] § 163 Am. Code. [5] 3 Com. 193. 3 Barb. S. C. R. 603.

manner of pleading the performance of a condition precedent. The judgment or determination of such court may now be generally stated "to have been duly given or made," and if the allegation *be controverted* the party pleading, (as on the performance of conditions precedent,) is bound to establish on the trial the facts conferring jurisdiction.[1] If not controverted, of course, the jurisdiction will be established on the trial without proof.

Pleading in cases of libel and slander.—The Code has also altered the rule of pleading in this class of cases. It is not now necessary to allege in the complaint any extrinsic fact for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation be controverted, the plaintiff shall be bound to establish on the trial that it was so published or spoken.[2] This does not, however, render it unnecessary to aver in the complaint the meaning of the words themselves, when such meaning becomes essential to the cause of action.[3] As, where, for example, the words standing alone do not, as a matter of law, impute a criminal offence, there should be an averment showing that the words were used in a sense intending to impute such an offence. Such averments are necessary to sustain the action where

[1] Am. Code, § 161.

[2] Am. Code, § 164; see 16 Wend. 9; 3 Com. 177.

[3] Pike *v.* Van Wormer, 5 How. Pr. R. 171., and see also Fry *v.* Bennett, C. R., N. S. 247.

words are ambiguous or uncertain in their meaning.[1] And when words are spoken in a foreign language it must be averred that the hearers understood such language.[2] The Code, it seems, has changed the common law rule of pleading in actions of slander in but one particular; that is, although it may be uncertain to whom the words were intended to apply, it is no longer necessary to insert in the complaint any averments showing they were intended to apply to the plaintiff; in other respects the rule formerly prevailing remains unchanged.[3]

In the case of Fry *v.* Bennett,[4] the sufficiency of a complaint in a case of libel was considered with reference to the change effected by section 164 of the Code, and the above decision in Pike *v.* Van Wormer concurred in. It was said by the court, that where the meaning of the words is so ambiguous that extrinsic facts are necessary to be proved to show them to be actionable at all, the necessity of stating those facts by an explicit averment, is precisely the same as it has always been, and that this section of the Code does not apply to such a case. Such facts must be proved, in order to entitle the plaintiff to recover,[5] and are material and issuable in their nature. But those allegations only are to be deemed material in the sense of the Code which the plaintiff *must prove, in order to maintain his action*. Hence it was said, in the same case, that matters which relate to the motives and intent of the defendant in publishing the libel, were not necessary to be inserted in the com-

[1] 6 How. Pr. R. 99; 2 Cow. 321; 4 Wend. 320.
[2] 3 Wend. 394. [3] 5 How. Pr. R. 16 Id. 99.
[4] 1 C. R. N. S. 238
[5] Kinney *v.* Nash, 3 Coms. 177.

plaint, because not necessary to be proved to entitle the plaintiff to recover; and although such allegations might not be liable to rejection as irrelevant, yet they might be justly treated as redundant and superfluous. A mere inuendo cannot be traversed; such a traverse raises no material issue. But matter of inducement when necessary to be proved may be traversed by the answer, and such traverse will raise a material issue. It is also said in the note to this case, that malice is the gist of the action for libel; and prior to the Code, the declaration had to allege malice, either directly or by some equivalent averment; in which case the defendant's plea of not guilty put the malice in issue. It is said, however, in a late case,[1] since the Code, that it is not necessary to aver express malice or want of probable cause in a complaint for libel. The point relates rather to the *onus* and measure of proof than the form of the pleadings. If, on the trial, it appears that the publication was made on a just occasion, the burden will thereby be thrown on the plaintiff of proving express malice; and then the question of probable cause may be enquired into.[2]

A complaint for slander is defective if it does not state that the words were spoken in the presence or hearing of some person,[3] but the word *published* in the complaint imports that the words were so spoken.[4] And it is necessary that the precise words used should be set forth;[5] the plaintiff must state distinctly what the charge is, so that the defendant may know for

[1] Purdy *v.* Carpenter, 6 How. Pr. R. 361.
[2] Per BARCULO J.
[3] 1 C. R. 117; 3 How. 406.
[4] 1 C. R. 134.
[5] 7 L. O. 316.

what he is sued. Actionable words, not alleged in the complaint, are not admissible in evidence.[1] An omission to state the time and place of the slander is not a ground of demurrer; the court can order the pleadings to be made definite by amendment.[2] Nor will a demurrer lie to a complaint which alleges that the defendant on *divers days and times*, between that day and the commencement of the suit, spoke the words complained of.[3] Time and place are in general immaterial, and need not be proved as laid in the complaint, and it seems under the Code[4] need not in general be alleged, except where they become matter of substance.

On bonds and instruments other than for payment of money.—The Code restricts the rule permitting the copy of a written instrument to be a sufficient cause of action to actions on instruments for the *payment of money only*. On bonds and instruments other than for the payment of money, the cause of action and breach of the contract must still be set forth substantially as before; that is, the facts required to be stated are those which the plaintiff must prove in the first instance at the trial, or be non-suited. It is sufficient to set forth a written contract according to its legal effect,[5] but where the meaning is doubtful it is advisable to set it out *in haec verba* and leave the court to construe it.[6] A party declaring on an agreement need only state so much of it as constitutes the en-

[1] 6 How. Pr. R. 292, and cases cited. [2] 7 L. O. 316.

[3] Gray v. Nellis, 6 How. Pr. 290.

[4] Though otherwise under the old system, 4 Denio, 80, and see 1 Chit. Pl.

[5] 8 Cow. 36, 2 Wend. 479. [6] 6 Hill 476.

gagement for the breach of which he complains. If, however, the defendant's covenants are qualified, or the plaintiff's covenants are enlarged by the further provisions, it must be stated.[1] It is necessary to set forth in the complaint such covenants or parts of the agreement as relate to the breaches assigned.[2]

Assignment of breaches in bonds are by statute to be made in the following cases: "When an action shall be prosecuted in any court of law, upon any bond for the breach of any condition other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff, in his declaration, shall assign the specific breaches for which the action is brought."[3]

A breach is in general well assigned by negativing the words of the condition or covenant.[4] But the assignment of two breaches of the same specific covenant, or stipulation, is bad.[5] A breach according to the substance though not the letter of the covenant is well assigned,[6] but when the pleader undertakes to assign a breach coming within the substance, intent, or effect of the covenant, he is held to a more strict rule than when he follows either negatively or affirmatively the words of the contract.[7] In a bond conditioned to do one thing or another, the complaint must negative both.[8] And a breach that the defendants did not honor the plaintiff's draft on one of

[1] 14 John. 400, 2 Denio, 235, 3 Id. 363.
[2] 2 R. S. 3d Ed. 475, sec. 6.
[3] Id.
[4] 5 John. 168. 8 Id. 111. 4 Wend. 570. 4 Hill 154.
[5] 1 Wend. 207.
[6] 2 Wend. 583.
[7] Per Bronson J. 4 Hill 154.
[8] 13 Wend. 597.

them, the covenant being to honor a draft on all of them is bad.[1] In declaring on a note for a certain sum payable in specific articles, it is enough to allege non-payment of the money; non-delivery of the articles need not be alleged.[2] A breach negativing the words in a covenant to "use all necessary care and diligence in the sale of lots" is sufficient.[3] A general breach is sufficient in a complaint on a bond conditioned that the party will appear and abide the order of the court.[4] If there be any defect or inaccuracy in assigning the breach, it is aided after verdict, for the court will intend that damages would not have been given if a good breach had not been shown.[5]

An account may be stated generally, and it is not necessary to set forth the items thereof in detail. The Code, however, makes provision for either party to obtain a copy of the account of his adversary.[6] The plaintiff's statement will be sufficient if he specifies the general nature of the account, as that the defendant is indebted to him in a specified sum for labor and services performed for the defendant, and a further sum for goods sold and delivered, and a certain other sum for the use and occupation of certain premises, amounting in the aggregate to so much, for which he claims judgment.[7] It would be safe also to apply the rule that the various portions of the account, and indeed the whole of it in the aggregate, should be so described in the complaint as to be capable of

[1] 1 Hill 66. [2] 4 Hill 164. [3] 4 Hill 154.
[4] 17 Wend. 59. 21 Id. 40. [5] 7 John. 461.
[6] Am. Code, § 158.
See Tucker *v.* Rushton, 2 C. R. 59. 7 L. O. 315.

being distinguished from any other demand of like nature, so that in a recovery thereon, though by default, and without other proof than the oath of the plaintiff to the complaint,[1] the record of the judgment may be a bar to any other suit to enforce the same demand.[2]

The extent to which the *common counts*, as they are called, may be used, has already been considered. They are proper when they express precisely the fact to be proved, as that the defendant is indebted to the plaintiff in a certain sum, for certain goods and merchandize, actually had and received by the plaintiff, and for which he actually promised to pay; or for work and services done for the defendant *at his request*, or for which he has promised to pay. And see further what was said on this subject in a previous portion of this section.[3]

In actions other than on contract.—The rule as to what facts are necessary to be stated in other actions, is entirely similar. The plaintiff should set forth expressly, or by necessary implication, every thing, which if denied, he is bound in the first instance to prove, in order to maintain his action. Thus, in an action against a bailee, who has come lawfully into possession of personal property, the complaint should aver a demand of the goods and refusal, or allege that the defendant has sold or destroyed the property, which is equivalent to a wrongful taking.[4] And generally, whenever a demand of the goods is neces-

[1] § 246 Am. Code.

[2] Ante, pages 145 to 150.

[3] See ante, page 145.

[4] 3 Wend. 406., 10 Id. 389.

sary to show the plaintiff's right of action, it must be alleged; and if not alleged it cannot be proved on the trial.[1] The legal fiction that the plaintiff being possessed of the goods, *lost* the same, and that afterwards they came into the possession of the defendant *by finding*, although, perhaps, the *legal effect* of the facts, should not be stated, but the facts themselves; as that the plaintiff was the lawful owner, or was lawfully possessed of the goods; that they came into the possession of the defendant in a certain way, specifying it; that the right of the defendant to the possession has ceased, with a demand and refusal, when necessary to sustain the action. The same may be said with respect to an action to recover the possession of personal property.[2]

In an action on an express warranty, the warranty itself, in consideration of the sale, is the cause of action; and no *scienter* need be alleged;[3] but in an action upon a false representation, or fraudulent concealment in the sale, the complaint, to be good, must aver a knowledge of the fraud on the part of the defendant, because to support the action such knowledge must be made to appear by proof on the trial.[4]

Many cases might be instanced to illustrate this principle. A single one in addition will suffice. In the case of failure of title to goods, where there is neither *express warranty* nor *fraudulent intention* on

[1] Bristol *v.* Rens. and Sar. R. R. Co., 9 Barb. S. C. R. 159.

[2] And see further on this subject, Manning *v.* Whitbeck, cited ante, page 151.

[3] Holman *v.* Dord, 1 C. R., N. S. 331.

[4] 4 Black Ind. R. 353.

the part of the seller, a complaint will show a good cause of action without averring either a *warranty* or *scienter*, because neither of them need be proved on the trial, the law implying a warranty of title in the thing sold, unless the possession of it be at the time in another.[1] In a complaint against B., in such case, A. need only allege the purchase for a valuable consideration from B., of the article which was in B.'s possession at the time of sale, and the failure of title, claiming judgment for damages therefor.

It may be properly observed in this place, that the question on an objection to the sufficiency of the facts stated in the complaint is not whether the complaint is perfect, and embraces every thing which might properly be embraced, but simply whether there are facts enough stated to sustain the action, and entitle the plaintiff, if he prove such facts, to a judgment. Thus it was held in Luddington *v.* Taft,[2] that in an action for an account between partners, a complaint which set forth a partnership, a dissolution of such partnership, the existence of unsettled accounts, and a balance in favor of the plaintiff, constituted a good cause of action and was sufficient, and it was not indispensable on the part of the plaintiff to set forth all the matters in detail, necessary for a full and final account.

It should be observed further, that in all cases, whether on contract, or for a wrong, the complaint must show the authority of the plaintiff to sue. Thus an assignee of a right of action on contract which the complaint shows was made between de-

[1] Cro. Jac. 197; 1 Salk. 210. [2] 10 Barb. S. C. R. 447.

fendant and a third party, must set out the assignment and show his interest as plaintiff. So in an action by a partnership for a debt contracted with the plaintiff and a partner since deceased, his death and the survivorship of the plaintiff should be alleged.[1] And so also in case of a defendant who was a joint contractor. And if the plaintiff sue as guardian and security for A., an infant, he must show how he is guardian and security, that he was specially appointed by the court, and that A. is an infant. If he sue as committer or receiver, he must show how he was appointed. A general averment that he was duly appointed, has been held to be insufficient.[2]

The principles above considered, and the foregoing rules as to what matters must be set forth in a complaint, are equally applicable to cases which heretofore would have been of equitable jurisdiction. They were well applied by JUSTICE SILL in the case of Aldrich *v.* Lapham,[3] an action brought to foreclose a mortgage where there were infant defendants, and the complaint did not allege the requisite facts to show what the interests of the infants were. The court in denying the application for judgment, says: "The rule applies now as heretofore, that the judgment must be *secundum allegata et probata.* The complaint must state the facts which entitle the plaintiff to judgment, and where they are not admitted, which, as against infant defendants, is never the case they must be sustained by legitimate proof. In the present case both these essentials are wanting."

[1] 1 John. 34. [2] 4 Denio 80. 7 Barb. S. C. R. 204.
[3] 6 How. Pr. R. 129. 1 C. R., N. S. 408.

What matters must not be alleged.—Having considered thus far what averments and facts are necessary to be alleged in order to constitute a sufficient cause of action, it will be now proper to notice what matters cannot be alleged in a complaint; that is, what matters the plaintiff is not at liberty to set forth as part of his cause of action.

The general rule is that all the facts necessary to sustain the plaintiff's cause of action must be set forth, *and no more.* Whatever circumstances are not necessary to constitute the plaintiff's cause of action or ground of defence, are surplusage.[1]

Surplusage taken in its general sense includes *unnecessary matter* of whatever description; as 1st, matters wholly *foreign and irrelevant;* 2d, matters which though not wholly foreign do not require to be stated, such as mere matters of evidence, matter of law, or other things which the court officially notices, matter coming more properly from the other side, matter necessarily implied, &c.; 3d, Unnecessary prolixity in the manner of statement.[2] Superfluous or irrelevant allegations also include those which are *repugnant* to what was before alleged.[3]

In pleadings at law surplusage was not a subject of demurrer, the maxim being *utile per inutile non vitiatur.*[4] In flagrant cases of the kind, however, the courts referred the pleading to an officer, that he might strike out such matter as was redundant and was capable of being omitted without injury to the

[1] See 1 Chit. Pl. 214.
[2] 1 Chit. Pl. 231.
[3] Steph. Pl. 432.
[4] Steph. Pl. 421–2.

material averments.[1] In some cases, too, the courts have, on motion, ordered the superfluous matter to be struck out of the pleadings, and if there were any vexation, have required the party inserting it to pay the costs of the application.[2]

In pleadings in equity *impertinence* was the same kind of fault which *surplusage* was at law. *Scandal* consisted in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause. To which may be added that any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous.[3] Scandalous or impertinent statements in a pleading in equity, if excepted to by a defendant, might be referred to a master, and on his report, expunged by the court with costs.[4]

Irrelevant and redundant matter.—The Code undertakes by a general provision to embrace all these various cases, and to provide an uniform mode of practice for reaching these defects in pleading. Section 100 of the amended Code provides:

"If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby, and when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment."

The Code has not defined what constitutes *irrele-*

[1] Steph. Pl. 421.
[2] 1 Barb. Ch. P. 41.
[3] id. 1 Chit. Pl. 231.
[4] 1 Barb. Ch. P. 41.

vant and *redundant* matter; we are, therefore, left to determine it by the rules already laid down in various judicial decisions, and from the analogy of the old practice at law and in equity. In its widest sense undoubtedly irrelevant and redundant matter may be considered as embracing everything that was surplusage in pleadings at law, as well as scandal and impertinence in pleadings in equity. Hence, unnecessary prolixity of statement, mere matters of evidence, conclusions of law, matters properly coming from the other side, as well as matters wholly foreign to the controversy, may be considered irrelevant and redundant. It is to be observed, however, that now as formerly, redundancy and surplusage do not vitiate a good pleading, nor can it be demurred to,[1] but is waived, unless the objection be taken by motion to strike out, which must be made before demurrer or answer,[2] and before noticing the cause for trial,[3] and within twenty days from the time of service of the pleading objected to.[4]

In Hynds *v.* Griswold,[5] it was said by Mr. JUSTICE HARRIS that the 160th section of the Code did not authorize an application upon motion to strike out every irrelevant or redundant expression or clause which might be found in a pleading. Effect must be given to the word "*aggrieved*," as used in that section. The matter must not only be irrelevant or redundant, but some party must be *ag-*

[1] White *v.* Kidd, 4 How. Pr. R. 68. Esmond *v* Van Benschoten, 5 Id. 441.

[2] Sup. Court Rules, 43; 2 Sand. 680.

[3] 5 How. Pr. R. 44.

[4] Id. 43. Rule 8. C.

[5] 4 How. Pr. R. 69.

grieved or prejudiced thereby.[1] In a subsequent case, however, before the same Justice, the language of this opinion was essentially qualified.[2] It was there said, it was not intended that before such a motion could be granted it must be shown that some actual injury would result to the moving party, if the matter sought to be expunged was suffered to remain. Every unnecessary expression or redundant sentence should not be expunged. But where entire statements are introduced, upon which *no material issue can be taken*, the opposite party may be "aggrieved" by allowing them to remain, and in all cases is entitled to his motion.

In the case last cited, JUSTICE HARRIS expressed his full concurrence with JUSTICE HAND in the view taken of the question in Carpenter *v.* West.[3] The opinion in that case expresses with much clearness and force what we regard as the true construction of this section of the Code:

"By irrelevant or redundant matter in the Code, I take it is meant, what is usually understood as impertinent; for a pleading in equity is impertinent when it is stuffed with long recitals, or long digressions which are altogether unnecessary and totally immaterial to the matter in hand.[4] It is like surplusage at law. According to Webster, *redundant* means superfluous, more than is necessary, superabundant;

[1] See also 2 Sand. 682, and Bedell *v.* Stickels, 4 How. 432.

[2] Williams *v.* Hayes, 5 How. Pr. R. 475.

[3] 5 Id. 53, at Special Term, August, 1850.

[4] See references to cases in this opinion, which are omitted in the above extract.

and *irrelevant*, not applicable or pertinent, not serving to support. Both, therefore, may probably come under the head of impertinent. Prolixity may become redundance, and Lord Eldon held that needless prolixity was in itself impertinence. It has been thought that irrelevant and redundant matter should not be struck out unless a party is aggrieved or prejudiced thereby, (per Harris in Hynds *v.* Griswold, supra.) With deference, I doubt that this is so to the fullest extent. As to scandalous matter, it is not clear that a person not a party to the record may move to strike it out. And the Court, it seems, will do it without application of any one. And impertinence in an answer was always exceptionable. My own impressions are, that as to scandalous and impertinent, irrelevant and redundant matter, *the Code has not in any respect changed the former practice in equity cases.* Its effect on what, before the Code, would have been cases at law, is not now under consideration. If this view is correct *the adverse party* may always be considered aggrieved by scandalous, irrelevant, impertinent and redundant matter in pleading. I think one may be considered aggrieved by the interpolation of matter into the pleadings in a cause, in which he is a party, foreign to the case; and he always had a right to have the record expurgated for that reason, without reference to the question of costs. If relevant, it cannot be scandalous. *And a few unnecessary words will not make a pleading impertinent.*[1] And courts should be liberal, especially until our novel system of pleading shall have be-

[1] See Dollner *v.* Gibson, contra, 3 C. R. 153.

come better settled and understood. Every fact direct or collateral, tending to sustain the general allegations of the bill, may be inserted, if done in a proper manner."

These views may be considered as embodying the settled rule of practice in the third and fourth Judicial Districts, and it is presumed elsewhere throughout the state.

In Hynds *v.* Griswold[1] it was held that any thing which it would be *material to prove upon the trial* ought not to be deemed irrelevant. This language was also qualified by the same Judge in Williams *v.* Hayes,[2] by the explanation that "facts which might be *material to the issue, as tending to aggravate or mitigate damages*, might properly be stated in the pleadings, though not necessary to constitute a complete cause of action." Perhaps this qualification is not sufficiently guarded, and indeed it may be said to be not entirely consistent with the rule laid down by the learned Justice in this same case, which we have elsewhere assumed to be the correct rule, namely, that facts which go to establish the *essential facts* in the case ought not to be inserted. Facts which the plaintiff may properly show to increase or aggravate his damages may not always be stated. It was so held by JUSTICE WILLARD in an action for a breach of a contract to convey land.[3] The plaintiff set forth in his complaint certain facts tending to enhance the damages resulting from a breach of the contract; the court held this to be mere matter of evidence upon

[1] 4 How. Pr. R. 70. [2] 5 Id. 475.

[3] MS. case, not reported, at Saratoga Special Term, Dec'r 1851.

which no material issue could be taken, and ordered the allegations to be struck out with costs. And it has also been several times held that matters going merely to *mitigate* damages ought not to be pleaded.[1]

In the case of the Rensselaer & Washington Plank Road Co. *v.* Wetsell,[2] and the case of Stewart and others *v.* Bouton,[3] the same principle is recognized as a well settled principle of pleading. JUSTICE HARRIS, in his opinion in the former case, says: "The motion to strike out redundant or irrelevant matter, is analogous to a demurrer, and should, I think, be decided upon the same principles. If the matter cannot be made the subject of a material issue, it has no business in the pleading, and ought not to be left there to embarrass the opposite party, and the Court. Mr. JUSTICE HAND has, in Carpenter against West, aptly compared this motion to exceptions for impertinence, under the former Chancery practice. With a single exception, I think the analogy will hold. That exception has already been noticed in several cases. It is that, under the Chancery practice, matters of evidence might properly be inserted in a pleading, while they are excluded by the theory of pleading adopted by the Code. Any matter which, upon exceptions for impertinence, under the Chancery practice, would be struck out as unnecessary and impertinent, should, upon motion, be struck out as redundant or irrelevant. I know of no better test, than that I have already mentioned, which is, to enquire whether the

[1] Unless pursuant to § 165, see 4 Sand. 664. 6 How. Pr. 15.

[2] 6 How. Pr. R. 68. [3] Id. 71.

matter objected to can, in any way, be made the subject, or form a part of a material issue."

This "*test*" referred to, is precisely the rule long recognized in Chancery, with the exception noticed above. In Woods *v.* Morrell,[1] Chancellor KENT remarks, that the best rule to ascertain whether matter be impertinent, is to see whether the subject of the allegation *could be put in issue*, or given in evidence between the parties. Or, as it is better stated in the case of the Mechanics' Bank *v.* Levy,[2] where the action is for relief alone, the cause of action must be stated in such a manner, that the main facts upon which the plaintiff's right to relief depends, "may be put in issue and tried."[3] Keeping in view the *exception* noticed by Judge HARRIS in the above case, that the *discovery* is abolished by the Code, and facts can no longer be stated merely as matters of evidence between the parties, the rules in regard to expunging scandalous and impertinent matter from the pleadings in equity, may be safely applied under the Code.[4] Mr. JUSTICE WELLES, seems to have lost sight of this exception in the case of Burget *v.* Bissell,[5] where in an action of trespass, for taking timber, he permitted an answer to stand, which in addition to a general averment that the title of the timber was in the defendant, proceeded to set forth at length, how such title arose.

It is true, as was intimated in thatcase, that in a

[1] 1 John Ch. R. 103. [2] 3 Paige 608.

[3] See remarks on this subject, ante page 65.

[4] 4 John Ch. R. 437. 26 Wend. 63. 5 Paige 522. 6 id. 239.

[5] 5 How. Pr. 192.

pleading in equity, facts which might be material in establishing the general allegations of a bill, or were material to the decision of the suit, either as to the subject matter of the controversy, the relief, or the costs, were relevant and not impertinent;[1] this is the principle recognized in Howard *v.* Tiffany,[2] as applicable to pleadings under the Code, and which perhaps may be regarded as a settled rule. But it is not true that the plaintiff may now, in any form of pleading, state mere matters of evidence which, though proper to be given in support of the issue, cannot themselves be made a material issue, capable of trial. This was held by the same Justice to be the rule in an action at law in the case of Shaw *v.* Jane.[3]

The exception referred to seems also to have been lost sight of by the learned Justice, who delivered the opinion in the case of the Rochester City Bank *v.* Suydam, before referred to,[4] wherein he arrived at the conclusion that certain matters ought not to be stricken out of the complaint "as embracing matters of evidence merely, for the reason that the convenience of a court of equity is promoted by having as many of the circumstances appear in the pleadings, and as few in the proofs as possible," &c. Although in the subsequent case of Wooden *v.* Waffle,[5] the same Justice recognizes and applies the important distinction alluded to above; and though still maintaining the doctrine that the Code does not provide

[1] 4 Paige, 174; 5 id. 522. [2] 3 Sand. S. C. R. 695.
[3] 4 How. Pr. R. 119.
[4] 5 How. Pr. 216, ante page 43.
[5] 6 How. Pr. R. 145, ante, page 43.

a uniformity of rules for the statement of equitable as well as legal causes of action, yet admits that, by the Code, the old bill of discovery is abolished, and that pleadings can no longer be used for the purpose of examining the opposite party. The conclusion in that case is substantially in accordance with the decisions in Carpenter *v.* West, and the Rensselaer Plank Road Company *v.* Wetsel, supra,[1] and is with great clearness and precision expressed as follows:

"Formerly there was no adequate mode of curtailing prolixity in a Chancery pleading. Exceptions for impertinence would not reach many cases of needless detail. The rule that *facts* and not *evidence* must be pleaded had no application. The party had a right to make his pleading an 'examination' of his adversary. Of course he might insert his evidence in order to obtain an admission. If the matter was relevant it was not impertinent, and could not be expunged. The Code, however, affords the remedy required. *The pleading can no longer be used as an examination.* All that is inserted for that purpose, therefore, may be stricken out as redundant. Statements may be redundant, which are neither impertinent nor irrelevant. *We may now apply to an equity pleading the rule that mere matters of evidence must not be pleaded,* although in a sense somewhat different from that of the common law, not as confining the party to the statement of such facts only as are essential to the cause of action or defence, and upon which a material, that is a *decisive* issue may be taken; but as limiting his right to encumber the record with details

[1] Ante, pages 177, 180.

which have no other bearing upon the case than to establish some other fact, affecting the equitable right in controversy."

We understand this to mean precisely what was said in Howard *v.* Tiffany, supra,[1] and to recognize the old Chancery rule laid down in Woods *v.* Morrell,[2] VanRensselaer *v.* Brice,[3] and Mechanics' Bank *v.* Levy,[4] with the qualification and exception stated by JUSTICES HAND and HARRIS, in Carpenter *v.* West and Rensselaer Plank Road Co. *v.* Wetsel, above cited. The case of Stone *v.* DePuga,[5] involving a similar principle, was decided in a similar manner, and a part of a complaint struck out for seeking to discover from the defendant mere matters of evidence.

An exception for impertinence founded on a few unnecessary words, should be disallowed, unless they may lead to the introduction of improper evidence.[6] A short sentence is not impertinent, although it contain no fact, or material matter, and may only be inserted in a pleading from abundant caution.[7] This is what is meant by giving effect to the word *aggrieved*, as used in the section of the Code referred to.[8]

An exception to a matter partly pertinent and responsive, must be overruled.[9] A party who seeks to have matter expunged, must specify the parts of the

[1] Ante, pages 40, 60. 3 Sand. S. C. R. 395.
[2] 1 John. Ch. 103. [3] 4 Paige 174. [4] 3 Id. 608.
[5] N. Y. Superior Court, 4 Sand. 68.
[6] 5 Paige 522. 6 Id. 239. Story Eq. Pl. § 267.
[7] 1 Edwards, 350.
[8] 4 How. Pr. R. 69. 5 Id. 475.
[9] 11 Paige, 15, 454. 4 Paige, 174.

pleading which he deems irrelevant and redundant. Where the whole complaint is objected to, a portion of it not particularly specified will not be struck out, though it be in fact irrelevant and redundant.[1] Nor can an entire pleading be struck out as irrelevant or redundant; the objection should be taken by demurrer.[2] The same was held in the Superior Court of New York, in the case of Fabricott *v.* Launitz,[3] namely, that an insufficient complaint was not *irrelevant*, within the meaning of § 160, and that the objection must be taken by demurrer. But if the objectionable matter in the complaint be immaterial, and be united with a good cause of action, it is not demurrable, but the objection must be taken by motion to strike out.[4] The irrelevant or redundant matter which section 160 of the Code authorizes to be stricken out, is such as implies that the pleading contains other matters which are material. Thus in Harlow *v.* Hamilton,[5] where a whole answer was bad, on a motion made by the plaintiff to strike out a portion of it as irrelevant, under section 160, leaving another portion which contained no valid defence remaining, the motion was denied, the Court holding that the party had mistaken his remedy, his proper course being to demur, or move to strike out the whole answer under section 152 as an irrelevant defence.

Of statement of facts showing right of arrest.—A question has arisen and been considerably discussed

[1] 6 How. Pr. R. 352.

[2] Nichols *v.* Jones, 6 id. 358. 4 Paige, 88. This however, is to be taken with the qualification in § 152.

[3] 3 Sand. 744. [4] 2 Sand. 702. [5] 6 How. Pr. R. 475.

by the courts, whether in an action on contract, where the debt is fraudulently contracted, or the defendant has removed or is about to remove his property with intent to defraud his creditors, or in any other action where the defendant is a non-resident, or is about to remove from the state, &c.; the plaintiff is at liberty to make averments of such facts in his complaint for the purpose of enabling him to take the defendant's body in execution.[1] In other words must the right to arrest the defendant appear in the pleadings; or, where the facts conferring such right to arrest constitute no part of the main cause of action, *can* they be stated in the pleadings without incurring the objection of irrelevancy? The question seems to be settled both upon principle and authority in the negative. It is true the Supreme Court of the sixth district, at General Term, held, that where the cause of arrest exists at the time of the commencement of the action it should be stated in the complaint,[2] thus confirming what was intimated by JUSTICE EDMONDS in Barber *v.* Hubbard,[3] and by JUSTICE HUBBARD in Gridley *v.* McCumber.[4] But in the later case of Barker *v.* Russell,[5] the General Term of the first district, overruling the decision in the same case, at special term,[6] laid down clearly and unequivocally the rule to the contrary. This case fully sustains, on this point, the decisions made at

[1] Am. Code, §§ 179 and 288.

[2] Corwin *v.* Freeland, 6 How. Pr. R. 241. This case has gone to the Court of Appeals.

[3] 3 C. R. 156.

[4] 5 How. Pr. R. 414, 3 C. R. 211.

[5] 1 C. R., N. S. 57.

[6] 1 C. R., N. S. 57.

special term in Secor *v.* Jones,[1] Cheney *v.* Garbutt,[2] and Masten *v.* Scovill.[3] And the point may therefore be regarded as settled. In the case of Lee and others *v.* Elias and others, in the N. Y. Superior Court,[4] the same principle was recognized, and JUSTICE CAMPBELL after advisement with all the Justices of the court, struck out as irrelevant and redundant, from a complaint on a promissory note, certain allegations that the goods for which the note was given were fraudulently procured from the plaintiffs. "We cannot accede to the idea," he remarks, "that the question of fraud, where it is in nowise applicable to the judgment to be rendered, is to be put in issue by the pleadings, in order to be tried in the action, merely to ascertain whether the case is one in which the defendant might have been arrested."

Similar views are expressed by JUSTICE HARRIS, in Masten *v.* Scovill, above cited: "It was never intended that the facts which rendered the defendant liable to arrest, except so far as they may be involved in a statement of the cause of action itself, should be set forth in the complaint. Should any matter, not pertinent to the cause of action, be inserted in the complaint, merely to show that the defendant is liable to arrest, as for example, that the defendant had removed, or was about to remove, his property with intent to defraud his creditors, I can see no reason why it should not be treated as redundant or irrelevant."

Such facts, of cause, cannot for any purpose be material to the issue or traversable, because they

[1] 2 C. R. 1, per JONES, J.

[2] 5 How. Pr. R. 467 per WELLES, J.

[3] 6 Id. 315, per HARRIS, J. [4] 3 Sand. 737.

constitute no part of the cause of action, nor do they, as in cases of an equitable nature, have any bearing whatever on the particular relief demanded. The kind of execution, as was very properly said by JUSTICE WELLES, in Cheney *v.* Garbutt, above cited, is not what was intended by the *relief* to be demanded in the complaint. The judgment of the court determines the *relief* granted, but the judgment does not undertake to specify in what manner it shall be carried into execution. The execution is a separate and distinct thing from the judgment, and the plaintiff it seems, at his own risk, must determine when and in what cases he is entitled to issue an execution against the body of the defendant.[1] Allegations merely going to show the right of arrest, are, therefore, neither constitutive of a cause of action, nor do they have any bearing upon the relief sought, and consequently are not capable of being put in issue and tried. If inserted in the complaint, they will be struck out on motion as redundant. There are, doubtless, some objections to this practice, and plausible reasons can be urged, why the judgment record should show on its face, enough to authorize an execution against the body. But until some such provision is expressly made by statute, the practice may be regarded on the authority of the above cases, as well as upon principle, to be settled to the contrary.

What matters need not to be alleged.—Besides the rule at common law, that evidence, or the circumstances merely tending to prove the material facts

[1] As to this point see cases above cited, and also Squire *v.* Flynn, 8 Barb. S. C. R. 169.

should not be pleaded,[1] there are some other rules tending to produce certainty and to prevent obscurity and confusion in the pleadings, which may be usefully applied to pleadings under the Code.

Thus it is laid down as a general rule, that *it is not necessary to state matter of which the Court takes notice ex-officio*,[2] as for example, the principles of the common law, or enactments by public statute,[3] for these the Judges are bound officially to notice; and by the Code, a private statute is sufficiently pleaded by referring to its title, and the day of its passage.[4] There are various other matters of which the Court judicially takes notice, as of the division of the State into Counties, judicial districts, &c.,[5] the meaning of English words, terms of art, legal weights and measures, the privileges of officers of the Court, &c., &c.,[6] and it is unnecessary to allege these matters in pleading.

It is not necessary to state matter which would come more properly from the other side, or to anticipate the answer of the adversary. It is sufficient that the pleading should contain a good *primâ facie* case without reference to possible objections not yet urged.[7] As in a complaint on a bond, or a contract, it is unnecessary to allege that the defendant was of full age at the time of the contract.[8] So too, in case of a debt barred by the statute of limitations, or discharged under the insolvent act, the plaintiff, it is

[1] 20 Wend. 57. 1 Denio 151.
[2] 3 Coms. 188. 12 Wend. 70.
[3] This is by statute.
[4] Steph. Pl. 350.
[5] Com. Dig. Pleader, 78.
[6] Am. Code § 163.
[7] See 1 Chit. Pl. 216, 226.
[8] Steph. Pl. 350.

presumed, need not show in his complaint that the debt is barred or discharged, and then set forth the facts on which he relies to avoid the effect, but leave the objection to come from the other side; though if he do show the debt barred or discharged, he should also state facts enough to avoid the statute or the consequences of the discharge.[1] Where a statute makes a writing necessary, as a lease for a term of years, it need not be pleaded to be in writing, though it must be proved to be so on the trial.[2] So too, in an action on a promise within the statute of frauds, it need not be stated to be in writing.[3] Nor need a special consideration be alleged in declaring in a note not within the statute.[4]

It is not necessary to allege what the law will presume.—An apt illustration of this rule is given in the case of an action for slander imputing theft; the plaintiff need not aver that he is not a thief because the law presumes his innocence till the contrary be shown.[5]

It is not necessary to allege circumstances necessarily implied.[6] As if a man plead that he is heir to A, he need not allege that A is dead, for it is implied.[7] Where a complaint on a promissory note set forth that the payee endorsed the same to the plaintiff, a demurrer that the complaint did not allege that the plaintiff was the lawful holder of the note was held

[1] See ante, pages 160, 161.
[2] 4 John. 237. 15 id. 424. 6 Hill, 33.
[3] 3 Cai. 286. 7 John. 321.
[4] 2 Wils. 147. 1 Chit. Pl. 226.
[5] Steph. Pl. 353, and cases cited.
[6] 1 Saund. 276
[7] 2 Saund. 305.

to be frivolous.[1] Damages necessarily resulting from breach of a contract are implied in law, and the facts going to show such damages need not and ought not to be specially alleged; but such damages as are not implied by law from a breach of the contract, and generally all consequential damages which do not necessarily arise from the injury complained of, must be particularized and specially stated.[2] Within this limitation the *dictum* in Williams *v.* Hayes, noticed supra,[3] that "facts which might be material to the issue as tending to *aggravate or mitigate damages*, might properly be stated in the pleadings," can be safely applied. And where various matters are alleged in aggravation of damages they need not be particularly stated or set forth in detail, as for example, in trespass, where the plaintiff declared that the defendant broke and entered his dwelling house, and forced open the closet doors, drawers, chests, cupboards, and cabinets of the plaintiff, it was held on special demurrer that the breaking and entering the house was the principal ground of action, and the rest being matters thrown in to aggravate damages, need not be more particularly specified.[4]

When a subject comprehends a multiplicity of matters, it is not necessary to set them forth in detail, but where great prolixity would be avoided or the allegation on the other side must reduce the matter to a certainty, a general mode of pleading is allowed.[5] On a

[1] Appleby *v.* Elkins, 2 Sand. 673.

[2] 2 Barb. S. C. R. 525. 12 Wend. 64. 13 id. 390.

[3] Ante, page 179. 5 How. Pr. R. 475.

[4] 3 Wils. 292, Steph. Pl. 371. [5] Steph. Pl. 254, 257.

promise by defendant to pay for such necessaries as the plaintiff should furnish a third person, the plaintiff alleged that he had provided necessaries to the amount of a certain sum. This was held good without specifying what the necessaries were.[1] The general rule above, however, is held subject to a qualification equally general, that where there is anything specific in the subject, though consisting in a number of particulars, they must all be enumerated; as in justifying a general charge of swindling, or claiming a forfeiture on the ground of non-compliance with a condition to furnish water to such as should be willing to take it.[2] No greater particularity is required than the nature of the thing will conveniently admit. As in an action for injury to goods, if the quantity or other description of the goods cannot, under the circumstances, be conveniently ascertained, such certainty will not be required.

How the facts must be stated.—Though the forms of pleading are abolished, and with them, the precise and methodical manner of expression to be found in the old precedents, including the formal commencement and conclusion of the pleadings, yet there are certain logical rules relative to the *manner of statement*, as well as to the substance of the pleading, founded in reason and good sense, which have grown up under the old system both in law and equity, and which, though not formally recognised by the Code, may still in many cases be usefully and safely applied under our present practice. A few of them with

[1] 3 Bulst. 31.

[2] 9 Wend. 351.

respect to the mode and manner of stating causes of action in a complaint will here be noticed. It may be added that much of what is said on this point will apply equally to the mode and manner of stating a defence by the defendant in his answer. In treating, therefore, of the defendant's answer in the following chapter, it will be merely necessary on this branch of the subject to refer to what is here said.

It was a general rule at common law that a pleading must not be double, that is, that the plaintiff could not allege in support of a single demand several distinct matters, by any one of which the demand might be sufficiently supported.[1] This, however, did not mean that if he had several distinct causes of action of a similar quality or character against the same parties, he was not allowed to include them all in one suit; on the contrary he was permitted to do so, though each separate claim or demand constituted a separate part of the declaration, technically called a *count*. The matters set forth in each count should constitute but one distinct subject of action and no more, and, though this cause of action might consist of a number of circumstances, yet, if together they constituted but one connected proposition or entire point, the pleading was not double.

A similar rule prevailed in equity, namely, that two or more distinct subjects could not be included in the same suit;[2] though two or more causes of action arising out of the same, or even distinct transactions, if of the same nature, might be joined against the same parties.[3] The offence against this rule was

[1] Steph. Pl. 251. [2] 1 Barb. Ch. Pr. 40. [3] Id. 432. 5 Paige, 137.

termed *multifariousness*, and rendered the bill liable to demurrer.[1] Thus, a bill against an executor for a legacy, and for an individual debt of the executor, is multifarious;[2] though a bill is not multifarious where it sets up one sufficient ground of relief, joined with another distinct but untenable claim.[3] So, too, at law mere immaterial matter could not operate to make the pleading bad for duplicity, even though the surplusage was relied upon by the party pleading it.[4] The proper way in such a case is to object, not to the whole pleading,[5] but to such parts of it as are immaterial, which, under the Code, can be done only by motion to strike out. In equity the term multifariousness, applied not only to complaints in which there was a misjoinder of distinct and independent causes of action, but also to the misjoinder of parties.[6] We have heretofore had occasion to consider each of these subjects under their appropriate titles, and need only refer the reader to what was there said,[7] and see further as to misjoinder of actions, post, chap. vii. sec. 2.

The Code seems to have adopted similar rules against *duplicity* and *multifariousness* in pleading. In the section providing for the union of causes of action, legal as well as equitable, in the same complaint, it is provided that:

"*The causes of action, so united, must all belong*

[1] 5 Paige 65.
[2] 4 John. Ch. R. 199.
[3] 5 Paige 137. 3 Barb. Ch. R. 432.
[4] Steph. on Pl. 259.
[5] 1 Coms. 222.
[6] Story, Eq. Pl. § 284. 1 Coms. 221.
[7] Ante, chap. 2 and chap. 3.

to one of these classes, and must affect all the parties to the action, and not require different places of trial, and *must be separately stated.*"[1]

And the fifth subdivision of section 144 allows a demurrer on the ground "that several causes of action have been improperly united." Whether this refers to the improper statement in a single count of several distinct causes of action, which might be properly joined if stated separately, or only to the misjoinder of different causes of action in the same complaint, see post, chap. vii. sec. 2.——It is intimated by JUSTICE SELDEN in Benedict *v.* Seymour,[2] that where two causes of action are thus mingled in the same count without properly distinguishing between them, a motion to strike out one of them, and not a demurrer, would be the proper way to take the objection. But JUSTICE WILLARD, in Durkee *v.* S. & W. Rail Road Co.,[3] allowed a demurrer for that cause, holding that if the causes of action are not *separately stated* it is made a distinct ground of demurrer, by sub. 5 of § 144. In other respects the views of JUSTICES SELDEN and WILLARD concur as to the effect of the 167th section, and the mode of stating different causes of action in the same complaint. Judge Selden says:

"First, then, it is plain that the rule of the common law, which prohibited *duplicity* in pleading, is fully maintained by the Code. Section 142 provides that the complaint may contain a plain and concise statement of the facts constituting 'a cause of action,' and by section 167 the plaintiff is authorized *to unite*

[1] Am. Code, § 167.
[2] 6 How. Pr. R. 298.
[3] 4 How. Pr. R. 226. 2 Code R. 145.

several causes of action in the same complaint, when they are of the same nature. How unite them? By mixing them up in one undistinguished and undistinguishable mass? Clearly not: reason forbids this. It needs not the result of centuries of experience to show us how inconvenient this would be. The Code sanctions nothing of the kind. It authorizes the statement of a 'cause of action,' that is, a *single* cause of action. No other construction is admissible. Hence, if the plaintiff wishes to include in his complaint more than one cause of action, he must distinguish between them by the phrase, 'And for a further cause of action the plaintiff complains,' &c.; or some other equivalent words. If he fails to do this every allegation which is not essential to a single cause of action must, if objected to, be stricken out as redundant. In other words the complaint, if it contains more than one cause of action, must be divided into distinct counts, like a declaration at common law. This is required not only by the provisions of the Code itself fairly construed, but by the paramount necessity of having issues which are to be tried by a jury clearly and distinctly presented."[1]

JUDGE WILLARD says: "The 150th and 151st secs. throw more light on this question. By those secs. the defendant is allowed to set forth by answer as many defences as he shall have. They must be separately stated and refer to the causes of action which they are intended to answer. The defendant is allowed to demur to one or more of the several causes of action stated in

[1] Benedict v. Seymour, 6 How. 301.

the complaint, and answer the residue. From these provisions, in connection with the foregoing, it is obvious that the Code intended that each cause of action should be embraced in a single count in the complaint, and that there should be as many counts as there are causes of action. Had the old phraseology with which the profession was familiar been retained, fewer mistakes would have been made in this respect. The requirement that the several causes of action must be separately stated in the complaint, is precisely equivalent to the requirement of a distinct count in a declaration, for each cause of action. Without such separation the defendant cannot have the benefit of a separate answer or demurrer. Nor can there ever be such an issue framed, as to enable the court and jury to try it in an intelligible manner."[1]

The same doctrine was repeated by JUSTICE WILLARD in Pike *v.* VanWormer;[2] and it was again said that a demurrer would lie for not separating different causes of action into different counts as required by § 167.[3] There can be, therefore, no question that this section of the Code fully maintains the common law rule which prohibits *duplicity* in pleading, and, it may be added, the equity rule which prohibits *multifariousness*. Each count, or to use the language of the Code, each statement, is required singly to contain a good cause of action, and one only. A similar doc-

[1] Durkee *v.* S. & W. Rail Road Co., 4 How. 228.

[2] 5 How. Pr. R. 172. See also Boyce *v.* Brown. 7 Barb. 80.

[3] But see same case, 6 How. 99, in which HARRIS J. dissents from some of the positions taken in that case.

trine was held in relation to the statement of a counter claim in the answer, by way of set off.[1]

If matter entirely irrelevant be mixed up with a single good cause of action, or unnecessary statements with the facts which constitute a single connected proposition, or distinct point,[2] or an untenable claim, or insufficient cause of action be united with a good one,[3] then a motion to strike out such objectionable matter should be made. But in a case of actual *duplicity* or *multifariousness*, where two or more distinct causes of action or defences are not *separately stated*, but are "improperly united," the practice sanctioned in Durkee *v.* Saratoga & Washington R. R. Co.[4] of taking the objection by demurrer might, it seems, be correctly adopted.

It has been held that where negligence is the ground of action, claims for injury to the plaintiff's person and his property, resulting from the alleged negligence, constitute but a single cause of action, and should not be separately stated. The Code does not abolish the causes of action as they existed before the passage of that act, nor does it in any manner define what should constitute a cause of action. It leaves all this matter as it was at common law, or in equity, before the Code was passed.[5]

It was well said in the case of Boyce *v.* Brown,[6] by JUSTICE HAND, that "good pleading should be

[1] Ranney *v.* Smith, 6 How. Pr. R. 420, and see post, chap. v. sec. 4.

[2] 3 Barb. S. C. R. 125. 7 Cow. 450.

[3] 5 Paige, 137. [4] Ante, pages 195, 196.

[5] Per Mason J. Howe *v.* Peckham, 6 How. Pr. R. 229.

[6] 7 Barb. S. C. R. 80.

material, single, true, unambiguous, consistent, and certain as to a common intent as to time, place, person and quantity, and not *redundant* or *argumentative*."

These constituted some of the main rules under the old system, which tended to produce certainty in the issue, and to prevent obscurity and confusion in the pleading; and the same general principles governed pleadings in equity.[1] A defect in some of these particulars, however, was merely a matter of form to be reached by special demurrer. Thus it was a general rule of pleading that the time and place of every material traversable fact must be stated.[2] The time, however, and in transitory actions, the place, were in general considered as forming no material parts of the issue, so that one time, or one place, might be alleged and another proved. Both were required to be inserted in order to give reasonable certainty and clearness to the general statement of facts, and an omission to insert them, being matter of form, must be reached by special demurrer, and the defect was cured after verdict or judgment. By the Code, however, matters of form are no longer objectionable; and an omission to state the time and place is no longer a ground of demurrer,[3] unless in statements of local description, where it becomes necessary to prove the place, or in cases in which the time and place[4] happens to form a material point in the merits of the case, and become part of the substance of the issue.[5] And where, from an omission to state the place or

[1] Story Eq. Pl. 3 v. [2] 4 Denio, 80. Chit. Pl.
[3] Finnerty *v.* Barker, 7 L. O. 316.
[4] See 6 Barb. S. C. R. 429. [5] Steph. Pl. 292,

time, or to specify quality, quantity, or value, the complaint fails to state the cause of action with reasonable clearness and certainty, the court, under section 160 of the Code, will order the pleading to be made definite and certain by amendment.[1] The Code specifies the cases in which this may be done, namely: "*When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent.*" This embraces all cases where the pleadings are *ambiguous* or *doubtful in meaning*, or where there is a *repugnancy*, that is an inconsistency with other statements in the same pleading, or where they are *unintelligible* by reason of the omission of material words, in all which cases, under the old system, the pleading was bad in form and might be objected to by special demurrer. Now, however, the defect can be reached only by motion to the court,[2] before demurring or answering, and within twenty days from the service of the defective pleading.[3] Or perhaps the court on its own motion at the trial may require the pleading to be made more definite and certain.[4]

The statements of the cause of action should also be *direct and positive*,[5] *and not by way of argument or inference*.[6] In an action of trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods, upon which the court remarked, "this is an infallible

[1] 7 L. O. 316.
[2] 2 Sand. 702.
[3] Rule 43, 4 How. Pr. 68.
[4] Semble, 7 Barb. S. C. R. 90, 91.
[5] It may be on "information and belief." See post, next page.
[6] Steph. Pl. 384. 7 Barb. S. C. R. 85, and cases there cited. 9 Barb. S. C. R. 297.

argument that the defendant is not guilty, and yet it is no plea."[1] Facts, and not mere conclusions of law, must be alleged, and these rules are applicable to the theory of pleadings adopted by the Code. In Russell *v.* Clapp,[2] it was held that an allegation in a pleading that a party to an action is not the real party in interest was bad on demurrer. The pleadings must state such facts as, when established by proof, will enable the court to say that the party is not the real party in interest. The same thing was subsequently decided in Bentley *v.* Jones,[3] and the principle held applicable to an allegation in the plaintiff's reply. So too in McMurray *v.* Thomas,[4] a general allegation of fraud, without setting out the facts showing the existence of the fraud, was held bad, as merely alleging a conclusion of law without naming the existence of facts by which it is supported, and as presenting no fact upon which an issue can be taken.[5] The allegation may be on information and belief, and it is sufficient if the plaintiff alleges his *belief* alone.[6] But he should not allege it on information and belief when the fact is presumptively within his own knowledge.[7]

It was also, and still is, a rule, that pleadings *must not be in the alternative, or hypothetical;* as where it was charged that the defendant wrote and

[1] Steph. Pl. 384. [2] 7 Barb. S. C. R. 482. 4 How. Pr. R. 347.
[3] How. Pr. R. 202. [4] 5 id. 14.
[5] See also 1 Code Rep. 91. 4 How. Pr. R. 98.
[6] 1 C. R., N. S. 270, and see form of verification, § 157 Am. Code.
[7] Richardson *v.* Wilton, 4 Sand. 708.

published, *or* caused to be written and published a certain libel, this was held bad for uncertainty.[1] And again, in an action against a gaoler for an escape, the defendant cannot plead that *if* the prisoner escaped, he escaped without the knowledge and against the will of the defendant, and *if* such escape was made, the prisoner voluntarily returned. The defendant cannot thus plead hypothetically that if there has been an escape there has also been a return. He must either stand on an averment that there has been no escape, or that there has been one, after which the prisoner voluntarily returned.[2] This rule has been repeatedly applied to cases of pleading under the Code. In McMurray *v.* Thomas, hypothetical pleading[3] was held bad on demurrer by JUSTICE WILLARD; and in Sayles *v.* Wooden,[4] JUSTICE CADY followed this decision. So too in Lewis *v.* Kendall,[5] JUSTICE MASON for the same reason held an answer to a complaint in slander denying, first, that the defendant ever spoke the words mentioned in the complaint, and then alleging that *if* the plaintiff proves he did speak them, the defendant would then prove certain things, to be bad on demurrer. He remarks: "The system of pleading under the present Code, I have no doubt, contemplated that the defendant in his answer should either confess and avoid the action made by the complaint, or that he should deny or traverse all the material facts contained in the complaint, and he must state facts and not arguments."[6]

[1] 8 Mod. 330. [2] 1 Bos. & Pul. 413. [3] Supra, page 201.
[4] 6 How. Pr. R. 84. [5] 6 How. Pr. R. 59.
[6] See also 6 How. Pr. R. 401, and post, chap. v. sec. 3.

Having thus presented these general principles in relation to the subject of the manner of the statement of the facts by the plaintiff in his complaint, it remains only to be added, that they are equally applicable to every class of action, as well as to every kind of relief—to a suit for an injunction, for the construction of a will or other instrument in writing, for the foreclosure of a mortgage, and for the partition of lands, as well as to an action of trespass to the person or property, or for the recovery of real estate, or for a mere money demand on a contract.

The pleadings in equity, though less technical than those at law, were, yet, always framed with a similar regard to certainty and uniformity, and in equity as at law it was held that there was a regular order and method in which the pleadings should display the grounds of the suit. Thus, it is said by Judge Story, in his Equity Jurisprudence, that every fact essential to the plaintiff's title to maintain the bill and obtain the relief, must be stated in the bill, otherwise the defect will be fatal. For no facts are properly in issue, unless charged in the bill, and of course no proofs can generally be offered of facts not in the bill, nor can relief be granted for matters not charged although they may be apparent from other parts of the pleadings and evidence.[1] The rule, however, indicated in the latter clause of the last sentence is somewhat modified by section 275, Amended Code, which provides that:—

"The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his

[1] Story, Eq. Pl. § 256.

complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue."[1]

The complaint should be sufficiently full and certain to enable the court upon the proof or admission of all the facts contained in it to grant the relief sought, and if not it is objectionable on demurrer for insufficiency.[2]

It was also a general rule in equity that whatever was essential to the rights of the plaintiff, and was necessarily within his knowledge, ought to be alleged positively and with precision.[3] Certainty was also required in a bill of complaint, and the remarks of Judge Story upon this point, may well be applied to all cases of pleading under the Code, namely that it is an elementary rule of the most extensive influence, that the bill should state the right, title, or claim of the plaintiff with accuracy and clearness; and that it should in like manner state the injury, or grievance of which he complains, and the relief which he asks of the court. In other words, there must be such certainty in the averment of the title, upon which the bill is founded, that the defendant may be distinctly informed of the nature of the case which he is called upon to meet. The other material facts ought also to be plainly yet succinctly alleged, and with all necessary and convenient certainty as to the essential circumstance of time, place, manner, and other incidents. If title deeds or other instruments are referred to, hey should not be set out *in hæc verba;* but the

[1] See next section of this chapter.

[2] Tallman *v.* Greene, 3 Sand. 437. [3] Cooper Eq. Pl. 6.

substance of such portions only of them as are necessary to a right understanding of the real matters of the bill.[1] But it should not state any impertinent or irrelevant matters, or any matters of which the court is bound judicially to take notice, such as matters of law, legal presumptions, or recite public acts or laws.[2] These principles are entirely similar to those already noticed as applicable to pleadings at law, and thus far perfect harmony and uniformity in the pleadings, characterize both systems. The points of difference, as we have already noticed in a previous chapter,[3] have been abolished by the Code, and the two systems blended into one.

In equity, though it was a general principle that the plaintiff's title could not be set forth in the *alternative*, yet a bill might sometimes be brought with a double aspect, as where the title to relief would be the same in each case, the plaintiff might aver facts of a different nature, which would equally support his application.[4] A bill with a double aspect was proper where upon his case the complainant was doubtful as to which of two kinds of relief he was entitled, or where the particular relief depended upon a fact of which he was uncertain.[5] It has been already noticed,[6] that under the Code alternative relief may be prayed, and the proper relief, whether legal or equitable, administered in the same action; but in such cases the relief prayed must not be inconsistent.[7]

[1] Story Eq. Pl. § 24. [2] Id. § 24. [3] Ante, pages 60 to 69.
[4] Story, Eq. Pl. 254.
[5] Lloyd *v.* Brewster, 4 Paige, 537. [6] Ante, page 50.
[7] 3 Sand. 668. 6 How. Pr. R.

Statutory provisions relative to actions concerning real property.—There are certain provisions of the statute relative to the statement of facts in a complaint in an action concerning real property, which may be here properly noticed. The Code provides that:

"*The general provisions of the Revised Statutes relating to actions concerning real property, shall apply to actions brought under this act according to the subject matter of the action, and without regard to form.*"[1]

Thus the provisions of the statute relative to what a complaint shall contain, in an action to recover real property, or for dower, or to foreclose a mortgage, etc., are still in force. In an action to recover real property, it is sufficient for the plaintiff to aver that, on some day to be specified, and which shall be after his title accrued, he was possessed of the premises in question, describing them,[2] and being so possessed, the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage any nominal sum the plaintiff may think proper to state.[3] If the plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in such declaration.[4]

So, too, in an action for the recovery of dower, the statute provides that the plaintiff shall state that she was possessed of the one undivided third part of the

[1] Am. Code, § 455. See also §§ 448 and 471.

[2] As provided in the subsequent section. See § 8, 2 R. S. (3d ed.) p. 401.

[3] 2 R. S. (3d ed.) p. 401, sec. 7. [4] Id. sec. 9.

premises, as her reasonable dower as widow of her husband, naming him.

In every other case for the recovery of real property, the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or the life of another, or for a term of years, specifying such lives, or the duration of such term.[1] And in case the action be not brought for dower, the declaration may contain several counts, and several parties may be named as plaintiffs jointly in one count, and separately in others.[2] The notice required by section 12 of the same title of the statute, it is presumed, is no longer necessary, it being inconsistent with the general practice and rules prescribed by the Code.

A complaint in dower, it seems, need not allege that the defendant is in the actual possession of the premises, or that six months have elapsed since the death of her husband.[3]

A complaint for the foreclosure or satisfaction of a mortgage must state whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected.[4] This is a matter of substance required by the statute and an omission to state it would be ground for demurrer. If the complaint shows that a judgment for the mortgage debt has been obtained it must also show that the remedy thereon has been exhausted, that is, that an execution against the property of the defendant has been returned unsatisfied in whole or

[1] 2 R. S. (3d ed.) p. 401, sec. 10.
[2] Id. sec. 11.
[3] Townsend *v.* Townsend, 2 Sand. 711.
[4] 2 R. S. (3d ed.) 245, § 205.

in part.[1] And if such allegation be not made, the complaint will also be defective on demurrer.[2] The mere pendency of a suit at law, it was held, would not bar a bill of foreclosure, but the suit could not be prosecuted without farther leave.[3] The mortgagee might sue at law upon the bond and at the same time foreclose the mortgage in equity.[4] This, under the Code, he may now do in one action, even though the plaintiff be the assignee of the mortgage. If the plaintiff has obtained judgment on a collateral security given for the debt by a third person he cannot it seems foreclose until he has exhausted his remedy on such judgment.[5] In such case, if he sets forth the judgment so obtained, his complaint must also allege the return of an execution unsatisfied, or the defendant may demur. If the complaint states that no proceeding have been had at law, &c., such objection may be taken by answer.

An action for the partition of property may be instituted under the Code by summons and complaint, as heretofore by bill in chancery;[6] or the proceedings may be commenced by petition under the statute, as was formerly the case; and when so instituted, the petition stands for the complaint, and the pleadings are intended to be similar to an action

[1] 2 R. S. (3d ed.) 245, § 206.

[2] 9 Paige, 137.

[3] 8 Paige, 70. 9 Id. 294, 370. [4] 6 John. Ch. R. 77.

[5] 4 Paige, 549.

[6] Am. Code, § 448. See also 1 C. R. 67. 2 Id. 13. 4 How Pr. R. 83. Id. 133. 3 Id. 318. 351.

under the Code.[1] The statute prescribes that the petition (and so also the bill, or, under the present practice, the complaint) shall contain the following matters:

1st. It shall particularly describe the premises sought to be divided or sold.

2. It shall set forth the rights and titles of all persons interested therein, so far as the same are known to the petitioner, including the interest of any tenant for years, for life, by the courtesy, or in dower, and the persons entitled to the reversion, remainder or inheritance after the termination of any particular estate therein, and every person who, by any contingency contained in any devise, grant or otherwise, may be or become entitled to any beneficial interest in the premises.

3. It shall be verified by affidavit.

It has been questioned whether the verification is absolutely necessary, under sections 156 and 157 of the Amended Code. The most safe and correct practice, however, seems to be in all cases to follow the statute and verify the complaint.

In case any one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the petitioner, or be uncertain or contingent, or the ownership of the inheritance shall descend upon an executory devise, or the remainder shall be a contingent remainder, so that such parties cannot be named, such fact or facts must be stated.[2] It is sufficient in a complaint in partition to allege

[1] 2 C. R. 69. 4 How. Pr. R. 125.

[2] 2 R. S. (3d ed.) 413, § 7.

that the parties are seized as tenants in common. It is not necessary to allege that the plaintiff is in possession of the premises, as that fact is presumed from the allegation that the parties are seized.[1] If the premises are held adversely, an action for partition cannot be sustained.[2] If that fact appear on the face of the complaint, it is presumed under the Code, a demurrer would lie.[3] If it does not so appear, the objection may be taken by answer.[4] Formerly, the practice was, that where the legal title was disputed and doubtful, the party would be sent to a court of law to have his title established.[5] But the bill would be retained to give the plaintiff an opportunity to establish his title at law.[6] It was customary also, in some cases, to set forth the conveyances by which the plaintiff held, or the evidence of his title. Now, however, under the Code, the fact of the seizin may be traversed, and the legal title determined, and it is questionable whether it is proper any longer to set forth the conveyances by which the plaintiff holds, or the evidence of his title. All this is matter of proof, and if the defendant deny that the plaintiff is seized, it is to be given in evidence on the trial.[7]

The Code prescribes that proceedings for the determination of claims to real property may be pros-

[1] 3 Paige, 242.

[2] 2 Barb. Ch. R. 398. 9 Cow. 530. 5 Denio, 385.

[3] 2 Barb. Ch. R. 398. [4] 3 Paige, 242.

[5] 3 John. Ch. 302. 4 Id. 271. [6] 1 Id 14.

[7] As to who may apply for partition, see R. S. § 1, Title 3, Chap. 5. Part 3. Also Act amending same, passed April, 1852.

ecuted by action under that act, without regard to form, &c.[1] The Revised Statutes particularly prescribe what the notice (and so it is presumed the complaint) shall contain, to which it is necessary here only to refer.[2] But it was held in the case of Crane *v.* Sawyer,[3] by JUSTICE GRIDLEY, that the proceedings by summons and complaint were utterly inconsistent with the provisions of the statute, and that notwithstanding the provision in the Code, the proceedings must still be commenced by notice in the manner prescribed by statute.

The writ of nuisance and the action of waste are abolished by the Code, and wrongs remediable by the action of waste and the writ of nuisance, are now the subjects of civil actions under the Code, without regard to the form of the action, so far as the same can be applied.[4] For the provisions of the revised statutes respecting writs of nuisance and actions of waste, and what facts are to be set forth therein, see titles 4 and 5, chap. v., part iii. But quere, how far, if the decision in Crane *v.* Sawyer, supra, is to be regarded as a rule of law, it affects these civil actions of waste and nuisance.

[1] Am. Code, § 449.
[2] 2 R. S. (3d ed.) 408, § 2.
[3] 1 C. R., N. S. 31.
[4] Am. Code, secs. 450, 451, 452, 453, 454.

SECTION III.

THE DEMAND FOR RELIEF.

THE third requisite which, by the Code, the plaintiff is required to state in his complaint is:

> A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded the amount thereof shall be stated.[1]

An omission to state any claim for relief in the complaint would be an irregularity, and, by the analogy of the practice in cases where no title, or a defective title of the cause is set out,[2] is to be corrected, not by demurrer, but on motion to set aside the complaint for the irregularity.[3] Or, it seems, the defendant, if he chooses to pursue that course, might, on motion, compel the plaintiff to make the complaint more definite and certain by amendment.

In an action at law for a money demand, the declaration, after stating the cause of action, and, when necessary, the special injury or damage resulting therefrom, usually concluded with what was called the *ad damnum* clause—"to the damage of the said plaintiff of ——" &c. The plaintiff might recover any less sum than that laid in his declaration, but in general could not recover more.

[1] Am. Code, sec. 142, 3d subdivision.

[2] 3 How. Pr. R. 407. 1 C. R., N. S. 20, 21.

[3] Ante, pages 131, 132.

In an action to recover specific real or personal property, the conclusion of the declaration was similar, and the plaintiff, instead of demanding the relief to which he supposed himself entitled, namely the possession of the land, or the restoration of the chattels, merely alleged that he was injured and damaged to a specified amount;[1] leaving to the court to pronounce the proper judgment on the facts as they appeared at the trial. A defect in the *ad damnum* clause was a matter of form merely, and the objection was taken by special demurrer.

In equity, the bill of complaint usually contained a prayer for the particular relief to which the complainant thought himself entitled. The usual practice was also to include a prayer for general relief at the discretion of the court, so that if the complainant should mistake the relief to which he was entitled in his special prayer, the court might afford him the relief to which he had a right, under the prayer for general relief, provided such relief was agreeable to the case made by the bill.[2] If there was no prayer for general relief none other could be granted than that specially asked for.[3] A prayer for general relief, however, was usually sufficient, without a prayer for particular relief, and the plaintiff, at the hearing, might ask the particular relief to which he thought himself entitled;[4] but in such case the court would grant such relief only as the case stated would justify,

[1] In Ejectment any nominal sum he thought proper to state, 2 R. S. (3d ed.) 401, sec. 7.

[2] Story, Eq. Pl. sec. 40.

[3] Id. Cooper, Eq. Pl. 13, 14.

[4] Id.

and would not ordinarily permit a bill framed for one purpose, to answer another, especially if the defendant might be surprised or prejudiced thereby.[1]

The theory of the Code seems to do away in all cases with the prayer for general relief, and to require the party specifically to demand the relief to which he supposes himself entitled. Thus in an action to recover real property, the complaint, after stating the case conformably to the principles already laid down, should conclude with a demand that the defendant be adjudged to deliver the possession to the plaintiff, with damages for the withholding thereof, such sum as the plaintiff may claim. So also in an action to recover personal property.

It is to be observed, however, that the Code relaxes the equity rule in one respect, namely, that where there is no prayer for general relief, though the plaintiff may have mistaken the particular relief to which he is entitled, yet the court, except in case there be no answer, may grant him any relief consistent with the case made by the complaint, and embraced within the issue.[2] If, however, there be no answer, the relief cannot exceed that which the plaintiff shall have demanded in his complaint.[3]

The common law rule that the plaintiff cannot recover in damages a greater sum than he claims in his complaint, it seems, is not affected by these provisions of the Code. If the recovery of money is demanded, the plaintiff is required to state "the amount thereof."[4] In an action which is brought for the recovery

[1] Story, Eq. Pl. secs. 41, 42; Cooper, Eq. Pl. 14.
[2] Am. Code, sec. 275. [3] Id. [4] Sec. 142.

of a sum certain, as on a promissory note, or for a liquidated demand, this may always be done with a reasonable degree of exactness. The plaintiff may claim such an amount, with interest thereon from such a date, and his costs. In cases of unliquidated damages, of course, the amount should be laid high enough to cover all possible damages; and the plaintiff may claim in his complaint, and may recover by the Code, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action.[1] The court will permit the complaint to be amended in the amount of damages claimed; and that, too, after issue joined in an action on contract, and after a reply, verified, reiterating the amount claimed in the original complaint.[2]

We have already seen that under the Code, the proper relief, whether legal or equitable, will be administered in the same form of action. In Linden *v.* Hepburne,[3] it was said that: "In some cases alternative relief may be prayed, and relief be granted, in one or the other form, in which cases an action at law was necessary to attain the one form, and a bill in equity to reach the other." But in that case it was very properly held that *inconsistent relief* could not be demanded in the same complaint, as that the plaintiff, a vendor, could not demand payment of an instalment of purchase money in arrear, and also a forfeiture of the contract of sale, and restoration of

[1] Am. Code, 276.

[2] Merchant *v.* N. Y. Life Ins. Co. 2 Sand. 669. S. C. 2 C. R. 66.

[3] 3 Sand. 671.

possession; or as in the case at bar, that the plaintiff, a lessee, could not demand, in the same complaint, a forfeiture of the lessee's term, and an injunction against him on a breach of the covenants in his lease. The same was held in the case of Getty *v.* Hudson River R. R. Co.,[1] and a complaint claiming, by way of relief, a remedy in the nature of an injunction with damages, for the injuries already sustained, was decided to be good. The court in that case very properly remarks: "In trying such a cause at the circuit, I should most certainly allow whatever amendment in the pleadings was necessary to give the party redress. If the plaintiff had asked for equitable relief, and it had turned out that he was entitled to legal relief only, I should permit him to take it in that form. And if he had asked for legal relief only, when he was entitled to both legal and equitable relief, I should allow the proper amendment, to administer complete justice in the case."

These views are entirely in harmony with section 275, Amended Code, above quoted, and the practice established of permitting legal and equitable relief to be administered in the same action.

But though the plaintiff may thus demand in his complaint alternative relief, yet it should be only such as is "*consistent with the case made by the complaint and embraced within the issue.*"[2] In other words, he should not ask too much, either directly or in the alternative. There does not, however, seem to be any way in particular in which a defendant can

[1] Per PARKER, J., 6 How. Pr. R. 269.

[2] Am. Code, sec. 275.

take advantage of such a claim. The prayer for relief does not constitute any portion of the "statement of facts;" it does not require a reply; no issue can be taken on any portion of it; it is addressed to the court, and will not be granted unless, upon the hearing of the facts and the law of the case, the party is entitled to the relief prayed for, and consequently, although defective, it will not be struck out on motion.[1] The Code makes provision whereby a party may protect himself against an improper judgment, without incurring unnecessary litigation. By section 385, Amended Code, the defendant may at any time before the trial and verdict, offer in writing to allow judgment to be taken against him, *for the sum or property, or to the effect therein specified, with costs.* If the plaintiff refuse to accept, and fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.[2] Wherever, therefore, the plaintiff demands other or different relief from that which the facts of his case, if proved, would warrant, the proper course will be for the defendant to follow the practice marked out in this section of the Code, and offer in writing to let the plaintiff take such judgment as he may be entitled to. If he refuse to do so, a defence may then properly be made to the action.

[1] Per CADY, J., Averill *v.* Taylor, 5 How. Pr. R. 478.

[2] Am. Code, § 385.

SECTION IV.

THE VERIFICATION OF THE COMPLAINT.

It was the object of the Commissioners of the Code in requiring all pleadings, except the demurrer, to be verified, to narrow down the issue as much as possible to the real matter in controversy between the parties, by getting an admission from either side of those facts in the case about which there was no real difference, and thus saving the trouble and expense of calling witnesses to establish such facts on the trial.[1] Accordingly the original Code provided that every pleading, except the demurrer, *must* be verified by the party, or attorney, to the effect that he believed it true,[2] except when the party would be privileged from testifying as a witness to the same matter, in which case the verification might be omitted.[3]

May be omitted when.—Under the latter clause of this section it was decided in Clapper *v.* Fitzpatrick,[4] that the verification might be omitted if the court can see that the matter contained in the pleading is such as might aid in forming a chain of testimony to

[1] See Rep. Com. 153.

[2] It was held that if not so verified, the pleading might be treated as a nullity. 3 How. Pr. R. 280, 1 C. R. 26.

[3] Orig. Code, § 133. [4] 3 How. Pr. R. 314.

convict the party of a criminal offence if properly receivable in evidence.[1] The clause has been amended so as to allow the verification to be omitted "*when an admission of the truth of the allegations might subject the party to prosecution for felony.*"

The section was amended in 1849 so as to leave it optional with the party to verify the pleading or not, prescribing substantially the old Chancery form of verification, and was again amended in 1851. As the two sections now stand they read as follows:—

§ 156. Every pleading in a Court of Record must be subscribed by the party or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

§ 157. The verification must be to the effect, that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true, and must be by the affidavit of the party, or if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by an agent or attorney, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in possession of the agent or attorney. When the pleading is verified by any other person than the party he shall set forth in the affidavit his knowledge, or the grounds of his belief, on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; and when the state, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with

[1] Post, chap. v. sec. v.

the facts. The verification may be omitted when an admission of the truth of the allegations might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.

Defective verification how treated.—Though it seems a pleading defectively verified may be treated as a nullity, yet it should be immediately returned, or notice given to the party that it will be disregarded, in order to allow him an opportunity to cure the defect.[1] If the defect were not promptly obviated the plaintiff might then treat the pleading as a nullity, and enter judgment as on a default. Or it would seem that, in case of no verification where one is necessary, the adverse party might move to set aside the pleading for the irregularity. This, it is held, he may do where a verification to the complaint is defective, as where it is made by an agent or attorney, and no cause is stated why it is not made by the party.[2] Or, in such case, he may immediately return it, and if the defect be not remedied at once, may treat it as a nullity.[3] The verification itself forms no part of the pleading; therefore, if defective, it cannot be demurred to.[4] But a copy of the verification must be served with the pleading.[5] And where a pleading is served without a verification, and afterwards re-served with-

[1] Liambeer *v.* Allen, 2 Sand. 648. Levi *v.* Jakeway, 4 How. Pr. R. 126. See also 1 Id. 240, 2 Id. 146, 3 Id. 64, 4 Id. 153.

[2] Webb *v.* Clark, 2 Sand. 647.

[3] Graham *v.* McCoun, 5 How. 353.

[4] 2 Sand. 647. [5] 5 How. Pr. R. 353.

out alteration, but with a verification, held that the pleading last served was not an amended pleading, the verification being no part thereof, and might be disregarded.[1] But it seems that on excuse shown, and in furtherance of justice, the court, on motion, will allow a complaint to be verified after it has been served.[2] If the venue be omitted in the affidavit of verification, the verification is a nullity, and the opposite party may so treat it without returning it.[3]

The form and manner of the verification is particularly pointed out by the Code. It must be made by the party, except in certain cases when it may be made by the attorney or agent, and when made by the attorney the reasons must be stated in the affidavit.[4] If the verification to the complaint, in this or any other respect, be insufficient, the defendant may treat it as though it were not verified, and put in his answer without oath; and such, it seems, is the proper course.[5] The party must regularly subscribe his name to the pleading or the affidavit.[6] But it seems the signature of the defendant to the verification is a sufficient "subscription" to the complaint within the meaning of the Code.[7]

The Code requires the verification to be to the effect, that the same is "true to the knowledge of the

[1] George *v.* McAvoy, 1 C. R., N. S. 318, per PLATT, J.

[2] Bragg *v.* Bickford, 4 How. Pr. R. 21, per WELLES, J.

[3] 6 How. Pr. R. 394.

[4] VanHorne *v.* Willis and others, 5 How. Pr. R. 238.

[5] Fitch *v.* Bigelow, 5 How. Pr. R. 237, per PARKER, J.

[6] Sand. 648.

[7] Hubbell *v.* Livingston, 1 C. R. 63, per WATSON, J.

person making it." It is sufficient, however, to swear that "*it is true*," which is in law a swearing that it is true *to the knowledge*, &c., of the person making it.[1] The verification must be that the same is true, "except as to those matters stated on information and belief, and as to those matters he believes it to be true." Under the amendment of 1849 the phraseology was "on information or belief." Under this section a verification that a complaint was true, "according *to the best of his knowledge and belief*," was held insufficient.[2] And in another case it was said that a verification was defective which used the words "information *and* belief" instead of "information *or* belief."[3]

If the affidavit is made by one of several parties pleading together, it must be by one of such parties acquainted with the facts, if he be within the county where the attorney reside, and capable of making the affidavit.[4] He should show in his affidavit that he has knowledge of the facts.[5] But if such party making the verification swear positively that he knows the facts to be true, and nothing is alleged on information and belief, the affidavit will not be defective in not stating that the deposing party is "acquainted with the facts."[6]

[1] Southworth *v.* Curtis, 6 How. Pr. R. 271, per HUBBARD, J.

[2] VanHorne *v.* Willis and others, 5 How. Pr. R. 238, per GRIDLEY, J.

[3] Burnett *v.* Harkness, 4 How. Pr. R. 158, per PARKER, J., also Davis *v.* Potter, 2 C. R. 99.

[4] Code. [5] 6 How. Pr. R. 400.

[6] 6 How. Pr. R. 272.

If the verification be made by the agent or attorney on a written instrument for the payment of money only, the affidavit must show that such instrument is in possession of the deponent, and need not state any other reason why it is not made by the party. If made by the agent or attorney in any other case, he must show that he has personal knowledge of the facts.[1]

The guardian of an infant plaintiff, it seems, may verify the complaint.[2] This case was decided before the amendments of 1849. Such, however, it is presumed is still correct practice under the Code. The guardian, for this purpose, will doubtless be considered "the party" within the meaning of section 157.

A verification to a pleading must not be made before the plaintiff's attorney. Such a verification, however, is not a nullity. It is a mere irregularity which is waived by the other side, unless a motion be made the first opportunity to set it aside.[3]

[1] Hunt *v.* Meacham, 6 How. Pr. R. 400.

[2] Hill *v.* Thacter, 3 How. Pr. R. 407. 2 C. R. 3.

[3] Gilmore *v.* Hempstead, 4 How. Pr. R. 153.

SECTION V.

SUPPLEMENTAL COMPLAINT.

In equity, where, by an event subsequent to the commencement of the suit, a new interest in the matter in litigation was claimed by an existing party to the suit, or a new party claimed the interests of an existing party (otherwise than by mere operation of law), a supplemental bill was allowed.[1] A supplemental bill was proper whenever the imperfection in the original bill arose from the omission of some material fact, which existed before the filing of the bill, but the time had passed in which it could be introduced into the bill by amendment. And generally a supplemental bill was not permitted to be filed whenever the same end could be obtained by amendment.[2] Matters arising since the original bill was filed, and which were material to perfect the complainant's case, might be introduced by supplemental bill, if the record was not in a state to admit of any amendment.[3] Matters which arose previous to the filing of the original bill, although discovered by the complainant afterwards, should be introduced by way of amendment, provided the cause was in that stage in which an amendment was allowable.[4]

[1] 2 Barb. Ch. Pr. 59, 3 Paige, 164.
[2] Story Eq. Pl. §§ 332, 333.
[3] 2 Barb. Ch. Pr. 60, 61.
[4] Id. 1 Paige, 201.

But if the cause had progressed so far that an amendment could not be made, or if material facts had occurred after the commencement of the suit, a supplemental bill might be filed. And so also if it became necessary to bring before the court some party essential to the proceedings who had been omitted to be introduced at the stage of the cause in which an amendment could be made, a supplemental bill might be filed for that purpose.[1] Nothing could be inserted in an original bill, by way of amendment, which arose subsequent to the commencement of the suit, but the same must be stated in a supplemental bill.[2]

These rules it is presumed are still, in the main, applicable to the practice under the Code, in cases where a supplemental complaint is allowed. The Code provides as follows:—

> The plaintiff and defendant respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made.[3]

It has been held under the Code that circumstances happening after the commencement of the action, cannot be introduced into the complaint by amendment; such matters must be brought before the court by a supplemental complaint, pursuant to sec-

[1] Story Eq. Pl § 268, Welf. Eq. Pl. 191, 2 Barb. Ch. Pr. 60.
[2] 2 Barb. Ch. Pr. 63, 1 Paige, 200.
[3] Am. Code, § 177.

tion 177.[1] This is in accordance with the former rule in equity.[2]

Under the liberal system of amendments allowed by the Code it is presumed that almost all other matters which might have been the subject of a supplemental bill, may now be introduced by amendment.[3] The court, *before* or *after* judgment, may amend the pleadings, &c., by adding or striking out the name of a party, or correcting a mistake, or inserting other allegations material to the case, *or* when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved. Parties might be brought in by amendment at any time *prior* to a decree under the Chancery practice.[4] But by the Code the pleading may now be amended, even after judgment, by adding or striking out the name of a party. Matters arising previous to the commencement of the action, and of which the party was ignorant, may be introduced into the complaint, by amendment, before issue, and the examination of witnesses; but, it seems, after that time, should be brought before the court by supplemental complaint.[5] A supplemental complaint may also bring before the court a party who was out of the jurisdiction of the court, when the original bill was filed, and who has since returned, in cases where it cannot be done by amendment.[6] Whether or not in analogy to the Chancery practice, a supplemental com-

[1] Hornfager *v.* Hornfager, 1 C. R., N. S. 180.

[2] Story, Eq. Pl. § 363, and cases above cited.

[3] See § 173 Am. Code, also post, chap. ix., Amendments.

[4] 3 Atk. 370. [5] 2 Barb. Ch. Pr. 60. [6] Id. 3 Denio, 155.

plaint will be allowed under the Code after judgment for the purpose of enabling the court to give directions not prayed in the original complaint, but which the result of the proceedings under the judgment has rendered proper, or whether a supplemental complaint may be allowed in aid of a judgment of the court, query?

In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative, or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action.[1]

This substitution is made on motion. Under the equity practice, if the interest of the defendant become vested in another, the defect was remedied by a supplemental bill.[2]

A supplemental complaint should state the original complaint and the proceedings thereon; and if it be occasioned by an event subsequent to the original complaint, it should state that event and the consequent alteration with respect to the parties, and should demand relief against all the parties. The facts stated should be material to the matters in controversy; if they are not, a demurrer will lie to the supplemental complaint;[3] or, under the Code, perhaps the defect

[1] Am. Code, § 121.

[2] Story, Eq. Pl. § 342.

[3] Story, Eq. Pl. § 43.

would be reached more properly by motion to strike out, or set aside the supplemental complaint. If the original complaint is wholly defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental complaint founded upon matters which have subsequently occurred. Yet, if the original complaint was sufficient for one kind of relief, and facts afterwards occur which entitle the plaintiff to other and more extensive relief, he may obtain it by setting out the new matter in a supplemental complaint.[1] Where a supplemental complaint sets up new facts it should make all the original defendants parties.[2] Otherwise, where it is filed merely to bring in parties.[3]

A supplemental bill could not, under the old practice, be filed without a previous order of the court, giving permission.[4] So, too, under the Code the plaintiff is "allowed on motion" only, to make a supplemental complaint, and an application for leave must be made to the court.

[1] 1 Paige, 168, 2 Barb. Ch. Pr. 67.

[2] 9 Paige, 538.

[3] 6 John. Ch. R. 450. 4 Id. 605.

[4] 2 Paige, 333.

CHAPTER V.

OF THE ANSWER.

THE only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.[1] The nature and office of the demurrer under the Code will be considered in a subsequent chapter. In the present chapter we shall treat the subject of the answer to the plaintiff's complaint in the following order:

1. Nature and use of the answer.
2. General and specific denial of the plaintiff's allegations.
3. The statement of new matter in the answer.
4. Counter claim, nature of, and when and how pleaded.
5. The verification to the answer.
6. Sham, irrelevant, and frivolous answers and defences.
7. The supplemental answer.

[1] Am. Code, § 143.

SECTION I.

GENERAL NATURE AND USE OF AN ANSWER.

The answer to the plaintiff's complaint, which the Code allows, is at once a substitute for the plea to the declaration at law, and for the plea and answer to a bill in equity. In an action at law there were pleas to the *jurisdiction*,[1] pleas in *abatement*, and pleas in *bar*. These pleas were pleaded in the order in which they are here mentioned, and which was said to be "the natural order of pleading." Where the defendant pleaded in *abatement* to the disability of the person of the plaintiff to sue or the defendant to be sued, he waived his plea to the *jurisdiction* of the court; and where he pleaded in *bar* to the action he could not afterward plead in *abatement*, unless for new matter arising after the commencement of the suit.[2]

Pleas in abatement were to some defect or error which merely defeated the *present* proceeding and did not show that the plaintiff was *for ever* concluded.[3] A plea in abatement was required, not only to point out specifically the error or defect, but also to show

[1] This plea was seldom or never used in practice.

[2] 1 Chit. Pl. 440, 441. 2 Cow. R. 417.

[3] 1 Chit. Pl. 445.

the plaintiff how such defect might be corrected, and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action; or, in technical language, it *must give the plaintiff a better writ.*[1]

A plea in *bar* went to the *merits* of the case and denied that the plaintiff had any cause of action; or, admitting that he once had, insisted that it had been determined by some subsequent matter.[2] Such defences as heretofore were to be set up by plea to the jurisdiction, or by plea in abatement, are now, like the plea in bar, to be taken by answer where the objection does not appear on the face of the complaint.[3]

It seems, however, from a late decision made at a * General Term in the fifth district,[4] that a distinction is still recognized between an answer which goes merely in abatement, and one which is in bar of the action. An objection in the nature of a plea in abatement, if not taken in the first instance by answer, is waived by an answer upon the merits; nor can such an objection by the defendant be inserted in a general answer, in bar of the action. It was so held in the case last cited, where the answer, after setting up several matters in bar, alleged a prior action pending for the same demand. It was said, in such case, that if issue be taken upon the facts alleged in abatement, as well as those in bar, and a general verdict be rendered against the plaintiff, it

[1] 1 Chit. Pl. 446.

[2] Id. 469.

[3] Am. Code, § 147.

[4] Gardiner and others *v.* Clark, 6 How. Pr. R. 449.

* Overruled 21 N.Y. (7 Smith) 399.

will be final, although, in truth, the verdict may be founded upon matters not affecting the merit.[1] A distinction was held to exist between "defences," mentioned in section 150, and "objections," or dilatory exceptions mentioned in sections 147 and 148. Such dilatory exceptions, or matters in abatement, as defect of parties, another action pending, plaintiff's want of legal capacity to sue, and the improper joinder of actions, should always be taken before a general defence in bar or answer on the merits. If the case above cited is to be regarded as authority upon the point in question, (and there seems no good reason for doubting it,) it would follow that such an answer would be defective on demurrer, or, at all events, that a motion would be entertained to strike out the matter in abatement as irrelevant, or compel the defendant to elect by which answer he would abide.

Allusion has already been made to the use of the plea in equity.[2] The answer, however, was the most usual method of defence to a bill in Chancery. It served a double purpose: *first*, that of answering the complainant's case as made by his bill; and *second*, that of stating to the court the nature of the defence upon which the defendant meant to rely. This is precisely the object of the answer under the Code. The defendant in the first place is called upon to deny, generally or specifically, each *material* allegation of the complaint which he intends to controvert.[3] He, however, need not, as under the equity practice,

[1] Gardiner and others *v.* Clark, 6 How. Pr. R. 449.

[2] Ante pages 34, 35.

[3] Am. Code, 149.

when he submits to answer, answer fully,[1] that is, answer the whole of the statements and charges contained in the complaint. But the effect of not answering and denying any *material* allegation in the complaint is precisely the same as though it were admitted to be true.[2] He may, however, without prejudice to his case, omit to answer matters not well pleaded, as matter immaterial to the issue, inferences of law, &c.,[3] and such also was the rule in equity.[4]

The second object of the answer in Chancery, as of the answer under the Code, was to state the facts upon which the defendant intended to rely in his defence; or in the language of the Code, "new matter constituting a defence or counterclaim."[5] A complainant had always a right to be apprised of the nature of the defence which the defendant intended to set up; the defendant was therefore bound to apprise him of the case or "new matter," on which he relied in his defence, in a clear and unambiguous manner—and he could not avail himself of any matter of defence not stated in his answer.[6]

In actions at law it was not necessary in all cases to set up affirmatively special matter, or to apprise the plaintiff specifically of the precise nature of the defence. The plea of the *general issue* denied the whole of the facts alleged in the declaration. A special plea was necessary in setting up new matter *not apparent upon the face of the declaration.*[7] But

[1] 3 Paige, 606, 7 id. 507.
[2] Am. Code, § 168, and see post, chap. viii. sec. 3.
[3] Post, pages 244, 245.
[4] 1 Barb. Ch. Pr. 133.
[5] Am. Code, § 149.
[6] 1 Barb. Ch. Pr. 137.
[7] Chit. Pl. 472.

under the general issue in an action of assumpsit or of debt on simple contract, not under seal, the defendant was at liberty to give almost every matter in evidence, on the ground, as was said, that as the action was founded on contract, and the *injury* was the *non-performance* of it, evidence which disaffirms the *continuing obligation* of the contract *at the time when the action was commenced*, goes to the gist of the action.[1] Thus, infancy, lunacy, duress, want or illegality of consideration, &c., might in such actions be given in evidence under the general issue; also, such defences as admitted that there was a sufficient contract made, but that before action brought, it was discharged, released, or performed; also those which admitted that there was once a cause of action, but avoided it by subsequent matter, as accord and satisfaction—the plaintiff an insolvent debtor, &c. But a special plea, or notice with the general issue, was necessary in setting up the defence of alien enemy, tender, former recovery, or judgment, for plaintiff or defendant on the same matter,[2] set off, and the statute of limitations.[3]

In actions of covenant and debt, on contracts under seal, the rule was more strict, and many of the defences, above mentioned, were required to be specially pleaded.

There can be very little doubt that it was the in-

[1] 1 Chit. Pl. 472.

[2] 12 John. 455.

[3] 1 Chit. Pl. 292, 2 Cow. Treat. 690, 692. But in an action of trover or assumpsit, former recovery was held admissible under the general issue. 6 Hill. 114.

tention of the Code to abolish the practice of permitting special defences to be set up under a general denial, as, for example, accord and satisfaction, or a release, or other matter going to show a discharge of the contract.[1] Indeed, it is said the general issue itself is abolished, and that every matter of defence must be specially alleged.[2] It was manifestly the intention of the Commissioners to adopt the equity rule, and to require the defendant to state the specific grounds of his defence, or discharge. They propose, they say, "that the plaintiff shall state his case according to the facts; and that *the defendant shall, by his answer, point out his defence distinctly.*"[3] Accordingly, the provision of the Code is, that the answer *must* contain, in addition to a denial of each material allegation controverted by the defendant, "*a statement of any new matter constituting a defence or counter-claim,*" &c.[4]

It was held, however, in a late case, in the Court of Appeals,[5] that in an action on a promissory note, an answer averring payment was not averring *new matter*, which it was necessary to controvert, for it was merely *taking issue* on a material averment in the complaint. Thus, the possession of the note by the plaintiff, was *primâ facie* evidence that it was not paid, and an averment of payment was held,

[1] See 6 How. Pr. R. 298, 1 C. R., N. S. 248, note.

[2] Fay *v.* Grimsteed, 10 Barb. S. C. R. But the late amendments have restored the general denial. See next section.

[3] Report of Com. p. 141.

[4] Am. Code, § 149. See post, next section.

[5] Giesson *v.* Giesson, 1 C. R., N. S. 414.

mere matter in denial of a material allegation in the complaint.* A plea of payment, however, it is to be observed, like a plea of release, or performance, *admits that a sufficient contract was made, but avoids it by subsequent matter.* Independent, therefore, of the above decision, and as an original question, it might well have been supposed that such an answer was new matter, which the Code *required* to be pleaded, and which could not be given in evidence if not distinctly stated in the answer. It has been held in the Supreme Court, at General Term,[1] that a defendant under the Code, could not give evidence of a matter of defence not set up in his answer. And in Pattison *v.* Taylor,[2] it was held in substance that facts from which the law raised the presumption of payment should be pleaded as a *payment* under the Code.

There are, doubtless, some matters of defence, which it is not necessary to set out specially in the answer, as matters which go to the essence of the contract, and show that no sufficient contract was in fact ever

* NOTE.—A plea of *payment* or *performance* could not be given in evidence under the general issue in an action on a contract under seal. 1 Chil. Pl. 426. And *query*, whether, under this decision of the Court of Appeals, a general denial of the facts in a complaint, on a sealed instrument without setting up the defence of payment, would authorize the defendant to introduce evidence of payment.

[1] Diefendorff *v.* Gage, 7 Barb. S. C. R. 21, per GRIDLEY, J.

[2] Id. 250, per HAND, J., at Special Term. The principle, in this case, of pleading a legal conclusion such as payment, instead of the facts, has been, as in the case of Dollner *v.* Gibson, very seriously questioned; and, it is doubtful, whether on principle or authority, the case can be sustained.

made, and all such matters as go to disprove any material allegation in the complaint. Thus, insufficiency or illegality of consideration need not in general be alleged in the answer; because the complaint on a contract must show on its face a cause of action on sufficient consideration, which must be proved.[1] A general denial of the complaint, or a specific denial of the consideration, is sufficient to put the plaintiff upon his proof.*

It may well be doubted, however, whether *all matters* which go to show that no sufficient contract was ever made, can be admitted in evidence under the general denial allowed by the Code. Thus, infancy, lunacy, or coverture, at the time of the contract, might be admitted under the general issue by the old mode of pleading. It has, however, been held in a late case at the Special Term,[2] that this cannot now be done; and that a "general traverse, under the Code, authorizes the introduction of no evidence on the part of a defendant, except *such as tends directly to disprove some fact alleged in the complaint.*"[3] I do not understand that the case of Giesson *v.* Giesson in the Court of Appeals, cited supra,[4] conflicts with this

* NOTE.—But query, where the law *implies* a consideration, and it is neither necessary in the first instance to aver nor prove one, as on a promissory note, whether the want or illegality of consideration, should not properly be set up in the answer, if the defendant intends to rely on it in his defence. On a sealed instrument, it is required to be done by statute. 2, R. S. (3d ed.,) p. 504, §§ 96, 97.

[1] Ante, pages 137, 138.

[2] Benedict *v.* Seymour, 6 How. Pr. R. 302, per SELDEN, J.

[3] See also 1 C. R., N. S. 363. [4] Ante, page 235.

rule, which is certainly a safe and practical one in its application. That case, according to the report, decides merely that an averment of payment is not *new matter*, so as to require a reply; but that it is in substance taking an issue upon a material allegation (non-payment) expressed or implied in the complaint.[1] The plaintiff alleges negatively that the note is not paid, the defendant affirmatively avers that it is. Hence an issue is formed. The court, however, does not say that where a party brings his suit on a promissory note, which he may do simply by giving a copy of it, and claiming so much to be due thereon,[2] that the defendant may interpose a general denial, and under it introduce evidence of infancy, accord and satisfaction, release, payment, or other discharge, without apprising the plaintiff of the nature of the defence on which he relies.[3]

The question whether it is admissible to set forth specially any defence which *may* be given in issue, under a general traverse, was also very ably discussed by JUSTICE SELDEN in Benedict *v.* Seymour;[4] and the conclusion arrived at that *every special defence which consists of matter going to disprove any material allegation in the complaint, is defective, and must be stricken out on motion.*[5] We close this section with

[1] This is an example of an *affirmative traverse* to a negative allegation.

[2] Am. Code, § 162.

[3] And see post, section 3 of this chapter.

[4] 6 How. Pr. R. 298.

[5] See on this subject post, sec. 3 of this chapter, entitled, *What matter may be pleaded.*

the following brief extract from the same opinion, which expresses substantially the views we have here adopted, and states very concisely and clearly what, it is believed, is the true intent of the Code in its provision on this subject:

"Defences are divisible into two classes.

1. Those which deny some material allegation on the part of the plaintiff.
2. Those which confess and avoid those allegations.

There can be no good defence which does not belong to the one or the other of these classes. The Code, following the order of nature, has provided for both classes in section 149. By the common law these two kinds of defences had become more or less entangled and confused; the Code keeps them distinct. I have already remarked that no defence which does not controvert any material allegation of the complaint, can be given in evidence under a general or special traverse. Every such defence, therefore, must be pleaded specially."

The learned justice in a previous part of this opinion observes, that his remarks are not intended to have any bearing upon an action which is *equitable in its nature.* It is submitted, however, that the above observations, and the conclusions arrived at, are equally applicable to every class of action, whether *equitable* or legal.

SECTION II.

GENERAL AND SPECIFIC DENIAL.

THE Code, as amended by the Legislature of 1852, provides that the answer must contain:—

"1st. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief."

The original Code was as follows:—

"1st. In respect to each allegation of the complaint controverted by the defendant a specific denial thereof, or of any knowledge thereof sufficient to form a belief."

The amendment of 1849 inserted the words "*general or*," so as to read "a general or specific denial." The amendment of 1851 left out the words "general or;"* and the amendment of 1852 restored them again.

It will be unnecessary, therefore, in this place to consider the question whether a general denial was

* NOTE.—The amendment of 1851 made this clause of the section read as follows:—"A specific denial of each material allegation of the complaint controverted by the defendant according to his knowledge, information, or belief, or of any knowledge or information thereof sufficient to form a belief."

proper under the Code in any case, or to notice the decisions thereon. It is now allowed expressly by enactment; and the question, if of any importance, can only be so in reference to cases occurring before the late amendment.

General denial.—In favor of the section, as it stood requiring the denial to be *specific*, it was urged, that if a general denial was allowed, it would defeat the whole policy of the Code in respect to narrowing down the issue in pleadings. It was said, that although the complaint was sworn to and substanially true, yet if it contained one, even the slightest, misstatement, a defendant might deny it *as a whole*. A moment's examination, however, will be sufficient to demonstrate that this is not so. The answer is required to contain a "general or specific denial of *each* material allegation," &c. An answer that "the defendant denies the plaintiff's complaint," or "denies the allegations contained in the plaintiff's complaint in manner and form as set forth therein," would be manifestly insufficient, and might be taken advantage of by demurrer.[1] Effect must be given to the words "each material allegation." And if the general denial or traverse is used, it should be strictly in the form, "each allegation,"[1] or "each and every allegation set forth in the plaintiff's complaint." This will prevent the abuse of this general form of traverse, in cases where the plaintiff verifies his complaint for the purpose of narrowing down the issue by obtaining from the other side an admission of those material facts about which there can be no dispute. A denial of

[1] See post, chap. vii. sec. 3.

"each allegation," is in terms distributive; and if a single allegation in the complaint be true, the defendant will not be able to use this general form of traverse.

Under the ancient course of pleading in actions at law there were three descriptions of pleas in bar:

1st. The general issue.

2d. A denial of a particular allegation in the declaration.

3d. A special plea of new matter not apparent upon the face of the declaration.[1]

The first two of these descriptions of pleas are included in that clause of the Code now under consideration. The general traverse referred to is in many respects equivalent to the *general issue.*

Specific denial.—This form of denial answers in some respects to the *common* and *special traverse.*[2] Thus, under the old pleadings, a party might deny any *material* and *issuable* allegation in his opponent's pleading, and this although the matter was stated with more preciseness and particularity than was necessary.[3] So, whatever was necessarily understood, intended, or *implied*, from the plea, was traversable as much as if it were expressly alleged.[4] But matter

[1] 1 Chit. Pl. 472.

[2] See Steph. Pl. 153 to 178. The common *traverse* was mainly in use. It was a denial by way of express contradiction, in terms of the allegation controverted. It was usually in the negative form, as that "*the defendant never was indebted*," &c. If, however, the allegation traversed was negative, as in the plea of the statute of limitations, the traverse was affirmative.

[3] 20 John. 406. 1 Chit. Pl. 610.

[4] Id. 2 Saund. 40. 66 East, 411. 1 Ld. Raymd. 39.

not necessarily implied was not traversable;[1] nor could mere matter of aggravation, or mere inducement, or explanatory matter, not in itself essential to the substance of the case, be traversed;[2] nor immaterial matter, nor a mere matter or conclusion of law.[3]

These rules are still generally applicable under the Code. A specific denial may be made to any one material issuable allegation in the complaint, as in an action on contract, setting forth a consideration, the defendant may simply deny, if he please, and take issue upon the fact of the consideration; or the fact of the breach of the contract. He should, however, be careful in traversing one of several facts that he denies the one "most open to objection, for he admits those not expressly denied."[4] And by the Code every material allegation, not controverted, is, for the purposes of the action, taken as true.[5]

The specific denial of one material issuable fact reduces the question in controversy to a single point, which, as it is found in favor of one party or the other, is decisive of the action, or of the plaintiff's right to recover to the extent of the particular relief demanded. So, too, under the Code, a matter necessarily *implied* in the pleading may be specifically denied, and an issue raised thereon. In the case of Lord *v.* Chesborough,[6] the complaint was on a promissory note transferred to the plaintiff, and did not set out

[1] Saund. 312.
[2] Steph. Pl. 284, 385.
[3] 1 Saund. 23, Note 5, 1 Chit. Pl. 611.
[4] 12 Peters, 335.
[5] Am. Code, sec. 168.
[6] 1 C. R., N. S. 322. 4 Sand. 696.

the fact of the transfer and delivery to the plaintiff. The defendants, however, traversed that fact, and the court held it was competent for them to do so.[1] Where the allegation is that "A. is seized," &c., it implies that he is *sole* seized, and the defendant may specially deny that he is seized *alone*.[2] So, too, in a partition suit, though the person applying for the partition must be in the actual, or constructive possession of an undivided share;[3] yet, where a bill merely alleges that the plaintiff is *seized*, possession is presumed or implied;[4] and the defendant may traverse the fact of possession, and if he prove that the plaintiff is not in the actual or constructive possession, or that the possession is held adversely,[5] the complaint must be dismissed.

The rule that an immaterial allegation should not be traversed or denied, is also applicable to the Code, and that, too, from the very language of the section under consideration. So, too, that a mere inference or conclusion of law, is not the subject of a specific denial.[6] Nor is the prayer of the complaint traversable inasmuch as it does not require a reply, and no issue can be taken on it.[7]

It was, however, said in a late case,[8] that although the answer should properly deny material allega-

[1] See also Walrod *v.* Bennett, 6 Barb. S. C. R. 145, and Giesson *v.* Giesson, 1 C. R., N. S. 414.

[2] Salk. 629.

[3] 2 Barb. Ch. R. 398.

[4] 3 Paige, 242.

[5] 9 Cow. 530.

[6] 9 Barb. S. C. R. 297; 5 How. Pr. R. 14.

[7] 5 How. Pr. R. 476.

[8] King *v.* Utica Ins. Co.; 6 How. Pr. R. 485, per HAND, J.

tions only, yet, if the opposite pleading set up an immaterial allegation in a traversable form, there is no rule of pleading which can prevent the other party from denying its truth, or which requires the court to strike out that denial. The party making an immaterial allegation, should not complain, if issue is taken upon it. If such issues, however, encumber the record, or are calculated to embarrass the trial, the court would no doubt strike them out and reform the pleadings on motion of either party, or on its own motion at the trial.

It is to be observed further, that the plaintiff may traverse or deny as many material allegations in the complaint as he pleases, that is as many as he desires to controvert, and leave the rest unanswered,[1] the neglect to answer being in effect an admission of such allegations. But the omission to answer an immaterial matter or a conclusion of law, or anything not properly in the complaint, is not an admission thereof, and cannot prejudice the defendant on the trial.[2]

Denial on information and belief.—The amendment to the Code of 1849, permitted a defendant to deny each allegation of the complaint "*according to his information and belief, or of any knowledge thereof sufficient to form a belief;* and the amendment of 1851, "according to his knowledge, information, or belief, or of any knowledge or information thereof sufficient to form a belief."

Under the Code of 1849, it was held that an answer, verified, denying an allegation, on *belief* only,

[1] 3 C. R. 175; 4 How. Pr. R. 155. [2] 6 How. Pr. R. 485.

was sufficient.[1] In the N. Y. Common Pleas, it was said that an answer, alleging that "the defendant is ignorant of whether," &c., was insufficient.[2] The amendment of 1852 seems to have brought back the practice, in this respect, substantially to what it was under the original Code and the former equity system.[3] If the fact charged is within the defendant's personal knowledge, he must answer positively, and not to his remembrance or belief;[4] and as to facts not within his personal knowledge, he must deny any knowledge thereof sufficient to form a belief.[5]

A denial to the effect that the defendant is ignorant of the facts contained in the answer, and has not sufficient knowledge thereof to form a belief, was held sufficient at General Term in the 4th District, in Doremus *v.* Lewis,[6] overruling the decision on the same point at Special Term. It was considered not necessary in addition, to "controvert" specifically the allegations. This principle, held with respect to the reply, is equally applicable to the answer. But a fact which is presumptively within the knowledge of the defendant, must be denied positively, and not on information sufficient to form a belief, as in Richardson *v.* Wilton,[7] where such an answer was struck out as sham and frivolous in an action of assault, charging the defendant with a particular assault.[8] An answer that the defendant has no knowledge or information of certain facts, except from documents which are not made part of the answer, and the substance of which

[1] 4 How. Pr. R. 155, per PARKER J. [2] 3 C. R. 152.

[3] The language is, "*of any knowledge or information thereof sufficient to form a belief.*"

[4] 6 How. Pr. R. 355. [5] 1 John. Ch. R. 103.

[6] 8 Barb. S. C. R. 124. [7] 4 Sand. 708.

[8] See also 1 C. R., N. S. § 204. Id. 225.

is not set forth, is insufficient.[1] The defendant must answer as to his information, and is not excused therefrom by alleging that he has no knowledge except what is derived from the allegations of the bill.[2] And in a late case in equity, it was held that an answer of the defendant that he does not know, or believe the fact charged, is insufficient. He must answer as to his information.[3] Where the defendant has no knowledge or information as to any of the facts charged in the complaint, or no knowledge or information sufficient to form a belief, he may so state generally without answering each allegation separately, and put the whole matter in issue by the general traverse.[4] And so also, if he desires to take issue upon any one or more material allegations in the complaint, leaving the residue unanswered; it may be done under the allegation that he has not "*knowledge or information thereof sufficient to form a belief.*"[5] If not in this form, the denial must be *positive*, in order to put the allegation in issue.[6]

An answer denying that the defendant has "sufficient knowledge or information to form a belief as to whether the plaintiff is now the lawful owner and holder" of a promissory note, as was alleged in the complaint, forms an issue which requires the plaintiff to prove his ownership of the note on the trial, and such an allegation cannot be stricken out as frivolous.[7]

[1] 3 Paige 186. [2] Tradesman's Bank *v.* Hyatt, 2 Edw. 195.
[3] Robinson *v.* Woodgate, 3 Edw. 422. [4] 3 Paige, 210.
[5] Am. Code 1852, § 149, 5 How. Pr. R. 321. 6 Id. 321, 329.
[6] Id.
[7] Temple *v.* Murray and Ely, 6 How. Pr. R. 329, per CRIPPEN, J.

An answer in this form raises an issue, in which the plaintiff holds the affirmative, and which gives the defendant on the trial all the benefit of introducing proof which he would have on a positive denial,* and this, too, whether the answer is verified or not.[1]

An allegation in an answer that the facts are true as this defendant has been informed and believes, "is equivalent to an averment *on information and belief*."[2]

Denial generally.—It is not always sufficient to answer the charges literally, but the substance should be traversed, or confessed and avoided positively and with certainty.[3] As a general rule, where the charge in the complaint embraces several particulars, the answer should be in the disjunctive, denying *each* particular, or admitting some and denying others, according to the fact.[4] So held under the Code, where in a complaint it was alleged that the defend-

* NOTE.—The contrary is stated by Mr. Monell in the first edition of his "Practice." The defendant on such an allegation, he says, leaves the case with the plaintiff, and is estopped from examining witnesses to disprove it. He must not only aver that he has not "sufficient knowledge," &c., but must accompany such averment with a *denial*, in order to introduce evidence to disprove the allegation.—Monell Pr. 146, 7. This practice, however, is manifestly incorrect; and it has so been expressly held in Snyder *v.* White, 6 How. 321. JUSTICE WELLES, in that case, says of such an issue, "that the party thus pleading would have all the benefit upon the trial, and the same right to introduce evidence, that he would have in case the fact had been directly and positively denied; otherwise, it seems, there would be no use or meaning in the section giving this form of denial."

[1] Snyder *v.* White, 6 How. Pr. R. 321; also 5 How. Pr. R. 321.

[2] Fry *v.* Bennett, 1 C. R. N. S. 238.

[3] 1 John. Ch. R. 103. [4] 2 Paige, 105. 11 Id. 235.

ant "assaulted the plaintiff *and* seized him by the collar *and* shook him violently;" the answer denied that the defendant did "assault the plaintiff *and* seize him by the collar *and* shake him violently." This was held bad on demurrer; the denial in the case should have been of each charge disjunctively, if the defendant intended to put the whole of them in issue.[1]

A denial must not be to the *manner and form*, but to *the substance* of the allegation. Hence, it is not enough to say, that a particular allegation of the complaint is not true *in manner and form as therein stated*, but that it is not true in any manner or form, or in any of its particulars, as for example, that the defendant did not on such a day, or on any other day, promise to pay the plaintiff such a sum, or any other sum.[2] It is also said to be improper to *express an admission* under the Code.[3] If the defendant intend to admit the truth of the allegation he should simply refrain from answering it at all. Such an allegation is thereupon by the Code, and according to the equity rule, deemed admitted.[4] I do not think, however, that an *express admission* of the truth of the allegation would, in general, be such a defect as would subject the defendant to the cost of a motion to correct the pleading.

In an action to recover land where the plaintiffs claim the lawful title, this is an allegation which the defendant is bound to deny if he means to put

[1] Hopkins *v.* Everett, 3 C. R. 150, 6 How. 159, per BARCULO J

[2] Monell's Pr. (2d ed.) p. 364. 1 C. R. 91.

[3] Monell's Pr. (2d ed.) p. 364.

[4] § 16 3 Am. Code, 8 Paige 88.

the title in issue; but it seems that he is at liberty to controvert the allegation in express words, or to set out the existence of facts, which, if true, would show that the plaintiffs had no title. So held at General Term in the 2d district.[1]

An affirmation in an answer that a defendant "does not recollect" having done an act, is not tantamount to a direct and unequivocal denial, nor to a declaration that he did not believe that he did it.[2] If the defendant answers that he has not any knowledge or information (sufficient to form a belief,) of the fact charged, he is not bound to declare his belief one way or the other;[3] and if he answers that he is "utterly and entirely ignorant" of the fact, it is sufficient.[4]

An answer which evades the facts charged, is defective, and no issue can be raised by it.[5] Such an answer, however, cannot be treated as a nullity if regularly put in.[6] Under the original Code, which made no provision for a demurrer to an answer, or for striking out irrelevant answers and defences, it was said that where an answer did not present a material issue, the plaintiff should move for leave to proceed as if there had been no answer.[7] The Code, however, has now made specific provision in such cases.[8] Where a denial is defective and does not

[1] Corwin *v.* Corwin, 9 Barb. S. C. R. 219, per BARCULO, J. See also preceding section.

[2] 1 Dana, 56. See also 6 How. Pr. R. 355.

[3] 3 John. Ch. R. 297. [4] Id.

[5] 4 Haywood, 292. [6] Hartness *v.* Bennet, 3 How. Pr. R. 288.

[7] Corning *v.* Haight, 1 C. R. 72.

[8] Post, sec. vi. Frivolous defences, &c.

properly put in issue the fact or facts attempted to be controverted, the plaintiff may object to the defect by demurrer.[1] But in a late case at special term the contrary of this has been held by MASON J., and the rule is laid down that a demurrer will not lie to matter in an answer which does not require a reply.[2]

After a reply to an insufficient answer, the plaintiff may move for judgment, as for default of an answer.[3] And generally where an answer is *insufficient*, that is, where admitting it to be true, the plaintiff is still entitled to recover, it seems the plaintiff may apply for judgment on the ground of the insufficiency of the answer;[4] but it is said the answer must be *palpably insufficient*, otherwise the objection should be taken by demurrer.[5]

[1] Hopkins *v.* Everett, 6 How. Pr. R. 159. 3 C. R. 150.
[2] 7 How. Pr. R. 59; but see post, chap. vii. sec. 3.
[3] Stokes *v.* Hagar, 1 C. R. 84.
[4] 6 How. Pr. R. 321. But see 2 C. R. 33.
[5] 6 How. Pr. R. 355, and see post, sec. vi.

SECTION III.

STATEMENT OF NEW MATTER IN THE ANSWER.

In addition to the general or specific denial required by the Code, the answer must also contain, if necessary to the defendant's defence:

2. A statement of any new matter constituting a defence or counterclaim in ordinary and concise language, without repetition.[1]

This provision is not substantially different from the original Code, or the Code as amended in 1849 and 1851, except in the introduction of the word "counterclaim" in place of the words "set off" inserted in the section by the amendment of 1852.*

In treating the subject of the defendant's answer, in respect to the statement of new matter, I shall adopt substantially the course taken in the preceding chapter, treating of the complaint. The statement of new matter, and particularly of the *counterclaim*, on the

[1] Sub. 2, sec. 149, as amended 1851.

* NOTE.—The subdivision of this section, as amended in 1851, read as follows:

2. *A plain and concise statement of any new matter constituting a defence or set-off without unnecessary repetition.*

The words "or set-off" were not found in the original Code, or in the amendment of 1849.

part of the defendant, is, in most respects, analogous to the statement by the plaintiff of his cause of action. The one is the allegation by the party demanding relief; the other is the allegation by the party defending, or claiming on his side such affirmative relief as may be properly administered in the same action. Many of the general rules of pleading, therefore, both those provided by the Code and those adopted from the old system, are equally applicable to the statement of the defendant's defence, as to the plaintiff's cause of action; and it will only be necessary, therefore, to refer to what was said on these subjects in the previous part of this work.

1*st. What matters must be alleged by the defendant.* —In a previous section[1] the question was briefly considered whether, under the Code, it was necessary to set up in the answer, as new matter, any thing which merely goes to show that no sufficient cause of action ever existed; as, in an action on contract that the defendant was a married woman, and could not, therefore, make a valid contract, or that the contract was void for illegality, &c., and the conclusion arrived at in the case of Benedict *v.* Seymour,[2] adopted, namely: that a defence which *goes directly to controvert or disprove any material allegation of the complaint*, may be given in evidence under a general or special traverse, and should be so pleaded; every other defence must be specially pleaded as new matter. And there seems to be no difference whether the material allegation is actually *averred* in the complaint, or

[1] Section 1, chap. v., ante, pages 233 to 239.

[2] 6 How. Pr. R. 298.

whether it is such as is necessarily *implied*.[1] The *implied* allegation, if material, may be denied, and matters merely going to controvert or disprove it, should be so pleaded.

The correct application of the rule, however, is not, it must be confessed, free from difficulty. Thus, what is an *implied material averment* in a complaint? That the plaintiff is the lawful holder and owner of a promissory note is, it has been said, a conclusion of law;[2] and yet, in another case, such an allegation was held to be traversable.[3] The ownership of the note by the plaintiff is a material fact to enable him to recover under the Code, because every action must be brought in the name of the *real party* in interest. Suppose, to a complaint either alleging this material fact, or leaving it implied, the defendant denies generally that the plaintiff is the owner of the note. This, of course, will put the plaintiff to the proof of it; but would the defendant be permitted, after the plaintiff had *primâ facie* established it, *to disprove* the fact, by showing the ownership in A., B. or C., without having alleged such ownership as new matter in his answer? It was held in Russel *v.* Clapp[4] that an answer alleging generally that the plaintiff was not the real party in interest, without stating the facts going to show that some person other than the plaintiff was the real party in interest, was bad on demurrer. And in McMurray *v.* Thomas,[5] it was said that an answer alleging fraud, generally, without setting forth

[1] See 1 C. R., N. S. 414, Id. 322, ante, page 242.

[2] 7 L. O. 150. [3] 6 How. Pr. R. 329, and cases supra.

[4] 7 Barb. L. C. R., 482. 4 How. 346, per HARRIS, J.

[5] 5 How. Pr. R. 14, per WILLARD, J.

the facts showing in what the fraud consists, or that the contract was without consideration and void, was bad.

The first of these cases was an action on a judgment recovered by the plaintiff against the defendant in another state. The defence was that, at the time of the action, the plaintiff did not own the judgment. The ownership, or interest of the plaintiff being a *material fact* to his right of recovery, if not set out in terms in the complaint, was necessarily *implied* from the fact that the judgment sued on was in the name of the plaintiff, and I am not able to see any sufficient reason why, within the rule laid down in Giesson *v.* Giesson, in the Court of Appeals, and other cases cited above, a specific denial of this material fact was not sufficient to put it in issue. The question as to the admissibility of evidence on such an issue might perhaps depend upon other considerations. The judgment itself, in the name of the plaintiff, would no doubt have been on his side, *primâ facie* evidence of his ownership. That being established, I do not see why the defendant might not be permitted to contradict or disprove this fact by proper evidence on the trial.*

* NOTE.—In a note to the case of Fry *v.* Bennett, 1 C. R., N. S. 244, the following case is given, which seems to illustrate the subject now under consideration. "The case of an action on a promissory note seems to afford an apt illustration of our view of the subject. There, on proof of the making, the consideration of the making is presumed; but if the defendant prove enough to rebut the presumption of consideration, then the plaintiff must prove consideration or he cannot recover."

Take the case of an action of trespass to lands. The plaintiff states that the defendant broke and entered *his* close. The defendant generally denies. This is sufficient to put the right of the plaintiff to sue in issue. It is maintained on the part of the plaintiff by simply showing *possession;* the defendant may controvert this evidence by showing the plaintiff not in possession, but if he wishes to show *title* out of the plaintiff, he cannot give it in evidence without pleading it specially. So, in an action for damages for converting personal property, the plaintiff might allege generally that he was *possessed* of the property, and need not set out the facts which, when proved, would enable the court to say, as matter of law, that he had such a property, (general or special) with possession, or right to possession, sufficient to maintain the action. Upon a general or specific denial the plaintiff, however, in order to recover, must prove, and the defendant might disprove, the plaintiff's property, and possession or right of possession. The allegation, therefore, was a material and traversable fact, and, though the question of property, and particularly the right of possession where there was no actual possession, might be a conclusion of law to be derived from other facts, yet it was never necessary for the plaintiff to set forth, or the defendant directly to traverse, such facts, but they might be proved on the one side and disproved on the other, under the general issue.

It is said that in an action on contract the promise of the defendant is the ground of the action. But an implied promise need not be set out in the complaint.[1]

[1] Ante, pages 156 to 159.

If in action on contract, the defendant in his answer allege that he did *not promise*, is this a material fact controverted by the answer, and if so, can the defendant give evidence tending to show that the promise was *void in law*, and not binding upon him? Under the old practice, as we have seen, in an action on simple contract, the defendant might plead the general issue, and give in evidence, infancy, duress, lunacy, that the form of the contract was insufficient under the statute of frauds,[1] and any other fact going to show that no sufficient contract was in fact made; but does this rule apply under the Code?

Within the principle laid down, that whatever goes directly to controvert or disprove a material allegation in the plaintiff's complaint may be given in evidence under a general or specific denial of such allegation, it is presumed, that any fact going to show the contract actually *void* may be given in evidence under such a denial. Thus, for example, a contract for the sale of lands, unless in writing, is void by the statute of frauds.[2] In an action on such a contract, the defendant may deny generally the plaintiff's complaint, or specifically the fact that he entered into such a contract, and if it appear on the trial that the contract was not in writing, the plaintiff cannot recover. So, too, if one enters into a contract through fear of threats, or undue and illegal force be used, the contract is absolutely void, and it is no doubt competent for the defendant to show the fact under a general or specific denial, without setting up

[1] Ante, page 234. [2] 2 R. S. 69, § 6.

the force or undue influence in his answer.[1] The contract of an infant or lunatic, however, is not absolutely void, but *voidable*, merely. He is bound to pay for necessaries for himself and family.[2] An infant may also bind himself by a renewal of his promise, on coming of age.[3] It will in all cases, therefore, be proper, if not absolutely necessary, if the defendant mean to rely upon infancy, lunacy, or any other fact going to show that the contract is *voidable*, to allege it in his answer as "new matter," by way of apprising the plaintiff of the exact nature of his defence.

Fraud in the execution of an agreement, whether by parol, or under seal, renders it void, as where one agreement is fraudulently substituted for another, or fraudulently misread. So also, all contracts made with a view to settle or compound criminal prosecutions; and, generally all contracts, the consideration of which is illegal. The facts constituting the fraud, or the illegality of the consideration, or other matters going to show the contract, or alleged cause of action, *void in its inception*, may, in all cases, be properly alleged as new matter in the answer. But it is thought, too, that such facts under a general denial, may be given in evidence to disprove or controvert the material allegation in the plaintiff's complaint, that such a contract was made, or was made upon a sufficient consideration, &c., &c. The rule, however, should be strictly held to apply only as between the original parties to the transaction. Where the contract, or cause of action, has been assigned, the defendant

[1] As to failure of consideration, see ante, page 237.

[2] Kent. Com. (8d. Ed.) 239.

[3] Id.

should never be permitted to defeat the plaintiff's claim on the ground that the contract was originally void, without apprising him specifically of the facts on which he relies to establish such a defence.

The case of McMurray *v.* Thomas,[1] supra, does not, it is believed, really establish any different rule from that above stated, although it was said in that case, that an answer setting up generally fraud in the contract was bad on demurrer. The answer, however, was held bad for another reason; namely, because it was *hypothetical*. The complaint, which was on a promissory note, contained all the necessary allegations to establish a cause of action. The answer, *first*, merely denied being indebted to the plaintiffs, which was held bad as a conclusion of law; and, *second*, alleged generally that if the plaintiffs were the holders and owners of the note, the same was obtained from the defendant by *fraud*, and was without consideration and void, which was bad as a hypothetical answer. There was no *general denial* of the facts stated in the complaint, and no *specific denial* that the note was *made and executed* by the defendant upon a valid consideration. The question, therefore, was not raised whether, if the defendant had, by his answer, directly denied that he made such a contract as was alleged in the complaint, evidence to show the pretended contract absolutely *void*, for fraud, might not be admissible.

In the case of a note void by the statute for usury, the rule it seems is different. The defendant, it has been held, cannot give evidence of usury on the

[1] 5 How. Pr. R. 14.

trial, unless his answer sets up the terms of the usurious contract, and the *quantum* of usurious interest;[1] such also was the rule under the former practice in equity.[2] The reason is given that such strictness should be required in this, "inasmuch as the effect of such pleading, if sustained, is *to set aside the entire contract*, and to deprive the party lending the money of even the money lent."[3]

In respect to those defences which admit that there was a sufficient contract, or a cause of action, but avoid it by subsequent matter, or show that the cause of action has been discharged, they should always, in order to entitle the defendant to give evidence of his defence, be specially alleged in his answer. Thus in an action arising on contract, all matters which admit that a *sufficient contract* was made, or that there was once a cause of action, but avoid it by subsequent matter, as release, parol discharge, alteration in terms of contract by consent, non-performance by the plaintiff of a condition precedent,[4] contract become illegal or impossible to perform, insolvent discharge of defendant, accord and satisfaction, tender, arbitrament, former recovery or trial and judgment on the same demand, higher security given, statute of limitations,[5] set-off or counter-claim of any descrip-

[1] Fay *v.* Grimstead, 10 Barb. S. C. R., 321, Gould *v.* Homer, 1 C. R., N. S. 356.

[2] 4 Paige, 526.

[3] Gould *v.* Homer, 1 C. R., N. S. 356, per MITCHELL, J.

[4] But see § 162 Am. Code as to pleading conditions precedent.

[5] § 74 Am. Code.

tion,[1] payment,[2] performance. Also, in an action for a wrong or injury, all matters which admit the commission, but *justify or excuse the act*, such as in trespass, distress for doing damage, license, right of way, inevitable necessity, title in third person or defendant; also all matters showing a discharge of the action, such as accord and satisfaction, former recovery, tender of amends for casual trespass, release, statute of limitations, &c., &c.;[3] also in actions either on contract or for wrongs, that the plaintiff has not legal capacity to sue, that the court has no jurisdiction,[4] that there is another action pending between the same parties for the same cause, and that there is a defect of parties, plaintiff or defendant, whenever any of these facts do not appear on the face of the complaint.[5]

It is to be particularly observed that, although under the old system, many of the above defences might be given in evidence under the general issue, as could also, in an action on simple contract, the defences of infancy, lunacy, coverture, insufficiency of consideration, duress, the statute of frauds, &c., &c., yet, as a general rule, the defendant had his election to plead them specially, or give them in evidence under the general issue, and although a defendant should plead specially that which amounted to the general issue, the defect was a mere *matter of form*,

[1] See next section.

[2] 8 Barb. S. C. R. 250. But see 1 C. R., N. S. 414.

[3] Cow. Treat., pages 690 to 698.

[4] But the question of jurisdiction may at any time be raised, and is not waived by a neglect to set it up in the answer.

[5] Am. Code, §§ 144, 147.

and could be taken advantage of only by special demurrer.[1] Therefore, there can be no objection under the Code to set forth specially each of these defences, even though as to some of them there might not be any absolute necessity of doing so. And it is always advisable to do so rather than encounter the risk of being obliged to amend on the trial in order to introduce the proper evidence. Thus in an action where the complaint alleged an *express promise*, supported by the consideration of a prior moral obligation, I do not doubt but, under a *specific denial of the promise*, it would be competent in an action between the original parties to the contract, for a defendant to show that the promise was extorted by threats of bodily harm; yet, at the same time, it might be proper as well as prudent to allege specially the fact as new matter; and so in other cases.

I do not understand that there is now any difference in the rules which should apply, as to the mode of the statement of new matter of defence, between actions which heretofore were classed as equitable, and those classed as legal. In the former class of actions, the defendant was bound to apprise the complainant of the nature of the case he intended to avail himself of by way of defence; and the complainant had a right to be informed by the answer, not only of the facts to be proved, but of the use intended to be made of them, and of the nature of the conclusions intended to be drawn.[2] But this did not extend to conclusions of law; nor could he, in his answer, state

[1] 2 Cow. Treat. 700, Grah. Pr. 237.

[2] 1 Barb. Ch. Pr. 137.

arguments, but must confine himself to facts.[1] And the defendant could not avail himself of any matter of defence not stated in his answer, even though it should appear in his evidence.[2]

These principles seem to be still recognized and acted on by the courts. Thus, in Diefendorff *v.* Gage,[3] it was held, that a defendant could not give evidence of a matter of defence not set up in his answer. Under an allegation that the property was "very poor and of very little value," the defendant was not suffered to prove that it was worth nothing at all; it being held, in order to admit the defence of a fraudulent representation of the article, or a breach of warranty, under the Code, in an action for the price, such defence must be set up with proper averments in the answer. Nor is it enough for a defendant to spread out certain portions of what may be the evidence in the cause, and rely upon that as an answer.[4] In an action to recover land, if the defendant wishes to put the title in issue, he must deny the allegation that the plaintiffs have the lawful title, or are seized, &c., in express words; it seems, however, he may set out the existence of facts which, if true, would show that the plaintiffs had no title; but by omitting to put the title in issue by a general or specific denial, he takes upon himself the burden of stating facts in his answer sufficient to show that the plaintiff has no title.[5]

[1] Id., Story Eq. Pl. § 852, Cooper Eq. Pl. 313.

[2] 1 Barb. Ch. Pr. 137.

[3] 7 Barb. S. C. R. 18, Jefferson General Term.

[4] 8 Barb. S. C. R. 250. Id. 219.

[5] Corwin *v.* Corwin, 9 Barb. S. C. R. 219.

An affirmative independent fact, in no wise connected with the defence set up, cannot be given in evidence unless pleaded. Thus, in an action on a covenant against the assignee of a lessee for rent, the defendant, under a denial of the execution of the lease and of the assignment to him, can set up no other defence, and will not on the trial be permitted to prove that before the rent became due he assigned all his interest to a third person who entered into possession, and was in possession when the rent became due.[1]

On a mere general denial, or specific denial, it seems the defendant cannot give evidence going to show a misjoinder or defect of parties. In an action by two or more persons for damages to personal property, the allegation in the answer that the plaintiffs are not the joint owners of the goods, it seems is "new matter" within the meaning of the Code.[2] In an action or contract against several defendants, alleged to be partners in business, an answer by one defendant that he "never was a co-partner," forms a sufficient issue.[3]

In an action for libel or slander.—The Code provides that the defendant in his answer may "allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstance."[4]

[1] Kettlelas *v.* Maybee, 1 C. R. N. 363, N. Y. General Term.

[2] Walrod *v.* Bennet, 6 Barb. S. C. R. 145.

[3] Corning *v.* Haight, 1 C. R. 72.

[4] Am. Code, § 165.

This section makes one essential change in the rules of pleading and evidence in actions of slander and libel, namely, that where the defendant alleges the truth of the defamatory charges, or justifies the speaking or publication, he may also allege and prove circumstances in mitigation of damages; but the matters pleaded in mitigation must be such only as can properly be given in evidence for that purpose, and such matters cannot be set up where the answer denies the speaking of the words.[1] If a justification is pleaded the answer must contain an admission of the speaking of the words.[2] It is said, however, that the defendant, by separate answers, may first, deny the speaking or publishing, and secondly, admit and justify.[3] An answer setting up a justification must contain a statement of the facts constituting this defence. It is not sufficient to allege merely that the words are true, but the defendant must state such facts as will show the plaintiff guilty of the offence imputed to him.[4]

An answer in slander, as in any other case, must either deny or traverse all the material facts alleged in the complaint, or it must confess and avoid them.[5] It should be certain, direct, and positive, and must state facts and not arguments, and must not be hypothetical or in the alternative.[6] An issue cannot be

[1] Graham *v.* Stone, 6 How. Pr. R. 15.

[2] Brown *v.* Orvis, id. 376. [3] Buddington *v.* Davis, id. 401.

[4] Anonymous, 3 How. Pr. R. 406. Sayles *v.* Wooden, 6 id. 84. Anible *v.* Hunter, 6 id. 255. Fry *v.* Bennett, 1 C. R., N. S. 238.

[5] Buddington *v.* Davis, 6 How. Pr. R. 401.

[6] Id. Lewis *v.* Kendall, 6 How. Pr. R. 59.

taken by answer on a mere inuendo or explanation to the meaning of the words published or spoken. If the inuendo is not confined to mere explanation, but materially enlarges the sense of the words, the proper course is to demur.[1] Nor are allegations in the complaint relative to the motive and intent of the defendant in publishing a libel traversable; but matter of inducement, when necessary to be proved in order to sustain the action, becomes material, and an issue may be raised thereon by answer.[2]

Where circumstances are inserted in the answer which it is intended to offer in mitigation, and not in justification, it should appear by some appropriate averment that such circumstances will be offered in mitigation only.[3] Any mitigating circumstances may be alleged with a justification in defence which the defendant will be allowed to prove on the trial; but allegations which he will not be allowed to prove, will be stricken out as irrelevant.[4]

It is held in an anonymous case at special term,[5] that under a general denial in an action of slander, the defendant cannot give evidence of the plaintiff's bad character. It does not appear from the brief note of that case, as reported, upon what ground the decision was put. In Graham *v.* Stone,[6] JUSTICE JOHNSON held the rule to be that the defendant had no right to allege in his answer any *mitigating circumstances*, where he did not also justify or allege the truth of

[1] Fry *v.* Bennett, 1 C. R., N. S. 238, per DUER, J.
[2] Id. [3] Id.
[4] Brown *v.* Orvis, 6 How. Pr. R. 376.
[5] 6 How. Pr. R. 160, per CADY, J. [6] Id. 15.

the matters charged as defamatory. In that case, he remarks: "Where the speaking of the words is denied, any such allegation in the answer is unnecessary. *The evidence may be given the same as formerly under the general issue*, and the pleadings ought not to be encumbered with such unnecessary details. It is proper here to notice an error into which the defendant's attorney, in common with many others of the profession, has fallen in regard to the character of the mitigating circumstances which a defendant is authorized to allege in his answer by § 165. It has been supposed that the terms, 'any mitigating circumstances to reduce the amount of damages' in this section, conferred the right upon the defendant to allege anything and everything he might deem proper, in excuse or palliation of the offence charged, without reference to the previous well established rules of law, as to what might, and what might not be proved in mitigation of damages. This error cannot be too soon corrected. The section in question is liable to no such construction," &c. Any mitigating circumstances were held to mean circumstances, which *the well established rules of law allow as evidence* in mitigation of damages, and nothing more. In that case the answer contained a denial of the speaking of the slanderous words, and there was no justification set up; but the defendant alleged by way of mitigation, certain scandalous reports concerning the plaintiff in the neighborhood, &c. The answer was held bad on demurrer.

The same doctrine has since been approved in Buddington *v.* Davis,[1] in Brown *v.* Orvis,[2] and in two

[1] 6 How. Pr. R. 401. [2] 6 Id. 376.

cases in the Superior Court of New York; namely, that unless the defendant admits and justifies, he cannot plead new matter in mitigation, but may give it in evidence under his denial.[1] It was also held in that court, that where the defendant admits the truth of the words, and sets up matter in mitigation, such matter is not a defence to the action within the meaning of § 168 of the Code, nor is it the proper subject of a demurrer or reply.[2]

If the defence relied on is *privilege*, the answer may set up the facts going to establish the legal conclusion that the words are privileged. If they are privileged only on the ground that certain events happened, the happening of those events must be sufficiently alleged in the answer in order to enable the defendant to avail himself of such privilege.[3] It has been intimated that an answer *denying malice* is now the proper mode of setting up the defence of privilege.[4] But this does not accord with the theory of pleading *the facts*, and not legal conclusions and inferences drawn from the facts. If the matters alleged as libellous are absolutely privileged no action will lie, however malicious or unfounded the charge may be; and in such action it is unnecessary for the defendant to deny malice.[5] If the defendant, therefore, set up his defence of privilege, under a mere denial of malice, it would be pleading a legal conclusion and not the

[1] Schneider *v.* Shultz. Meyer *v.* Shultz, 4 Sand. 664.

[2] Newman *v.* Otto, 4 id. 668.

[3] Fry *v.* Bennett, 1 C. R., N. S. 238.

[4] See note to Fry *v.* Bennett, 1 C. R., N. S. 244.

[5] Garr *v.* Selden, 4 Coms. 91.

facts of his defence, which, as we have elsewhere considered, is contrary to the spirit and intent of the rules of pleading adopted by the Code. The defence of privilege was formerly allowable under the plea of the general issue; and I can see no good reason why, under the general denial now permitted by the Code, such a defence could not be interposed. Or if the complaint be verified, and the defendant cannot deny the publication, he may admit it, and set up the facts showing his privilege as a justification. Express malice, it is said, need not now be alleged in a complaint, even when necessary to be shown on the trial;[1] nor need the defendant, when he justifies, set up want of malice in his answer, but he may do so if he choose. If it appear on the trial that the publication was made on a just occasion, the plaintiff must prove malice, or facts from which malice is inferred as a conclusion of law, and this proof the defendant may rebut by proper evidence on his part.[2] And see further on the subject of the defence of privilege in actions of slander, and proof of malice, the late cases of Howard *v.* Sexton, 4 Coms. 157. Cook *v.* Hill, 3 Sand. 341. Stanley *v.* Webb, 4. id. 21. Snyder *v.* Andrews, 6 Barb. S. C. R. 43.

Judgments and conditions precedent.—By the Code, the judgment of a court of inferior jurisdiction may be stated in the complaint to have been duly given or made in general terms. So also may the performance of conditions precedent in a contract.[3] The defendant in his answer may controvert and deny

[1] Purdy *v.* Carpenter, 6 How. Pr. R. 366, per BARCULO, J.
[2] Id.
[3] See ante, pages 162, 163.

such general allegation, which raises an issue under the Code.[1] On such issue the party pleading the judgment is bound to establish on the trial the facts conferring jurisdiction, and the defendant undoubtedly may disprove all or any of such facts by any competent testimony. So too, the party pleading the performance of the conditions precedent must establish the facts showing such performance, and the defendant under the issue thus formed, is at liberty to controvert and disprove them.

Property distrained for damage.—The Code provides that in an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained, was, at the time, doing damage thereon, shall be good, without setting forth the title to such property.[2] This is nothing more than a re-enactment of the statute relative to a plea by the defendant in such cases in an action of replevin.[3] The facts of the lawful possession of the real property by the defendant, and that the chattels distrained were doing damage, constitute new matter, which must be alleged by the defendant in his answer, in order to entitle him to give evidence thereof; but such allegation may be in general terms, and the facts going to establish the title may be proved on the trial. In other actions of trespass, &c., if the defendant justifies under title, right of way, &c., he should, it seems,

[1] Am. Code, §§ 161, 162.
[2] Am. Code, § 166. [3] 2 R. S. (3d ed.) p. 617, § 42.

plead specially the facts going to establish the title, &c., in order to introduce evidence thereof on the trial. This is in accordance with the general rule in actions at law, that the pleadings must show title.[1] It was sufficient to state a seizure in fee simple in general terms, that is, that the party "is seized in fee of a certain farm of land," &c. But in pleading a particular estate, such as an estate for life, for years, or at will, it was necessary to show the commencement of the estate, and the derivation of title from the last seizure in fee simple.

When statement of new matter sufficient.—The answer may admit one or more facts in the complaint, deny others, and allege new matter as to the residue to defeat the plaintiff's recovery. But the facts admitted must not of themselves be sufficient to authorize the plaintiff to recover, otherwise he will be entitled at once to judgment.[2] We have already considered briefly the description and nature of the new matter, which the Code requires specifically to be set up in the answer in order to be given in evidence on the trial; it remains under this head only to notice one or two general rules in respect to the sufficiency of the statement of new matter in the answer. And first; an answer seeking to avoid the complaint by new matter, should confess directly, or by implication, that, but for the matter of avoidance contained in it, the action could be maintained.[3]

An answer to be good by the settled principle of pleadings, as modified by the Code, must state the

[1] Steph. Pl. 306 to 328.

[2] Genesee Mutual Ins. Co. *v.* Moynihen, 5 How. Pr. R. 321.

[3] 2 Wend. 96, 5 How. Pr. R. 14, 6 id. 402.

facts constituting a legal ground of defence. These should be set forth in a plain, direct, definite, certain, and traversable manner; and though each defence must be stated separately, yet any number of facts constituting together but one proposition, or a single defence, may be alleged as such.[1] The general nature and requisites of the answer under the Code, are very clearly defined by JUSTICE HARRIS, in the late case of Buddington *v.* Davis.[2]

"What now is a good answer would before have constituted a good plea in bar. Each, the answer as well as the plea in bar, must present matter which furnishes a conclusive answer to the cause of action alleged in the complaint or declaration.[3] A plea in bar must either *deny* the facts stated in the declaration, or it must *confess and avoid them.* So, under the present practice, the answer must either *controvert* some allegation material to the cause of action, or state some new matter, which, admitting the allegations of the complaint to be true, will *constitute a defence.* In other words, it must *traverse or deny* the matter of the complaint, or it must *confess and avoid it.* In the latter class of pleadings, whether under the Code, or at common law, *confession* is an element as essential as *avoidance.* There must be an *express* or *implied* admission that the allegations constituting the cause of action are true, with a statement of matter which destroys their effect." Accordingly, it was

[1] Boyce *v.* Brown, 7 Barb. S. C. R. 80.

[2] 6 How. Pr. R. 401.

[3] Except in case where a *partial* defence, such as *recoupment* or set off, is allowed by the Code to be set up by way of answer.

held in that case that an answer in an action for libel, which set up that *if the defendant issued or published the alleged libel the same was true*, was bad on demurrer.[1]

The facts must not be stated hypothetically, nor in the alternative, nor must mere conclusions of law be stated, nor the intentions of the parties; nor, if such matters are stated on the other side, should they be answered by the defendant.[2]

In Thumb *v.* Walrath, it was held at special term,[3] that an answer assuming to go to the whole of a single cause of action, but containing facts which constitute a defence to a part only, is bad on demurrer;[4] and this, too, although the defendant had put in another and complete answer to the whole complaint. The action was to recover thirty-two acres of land, and the defective answer set up a defence only to a portion of the land. This doctrine was again asserted in the case of Willis *v.* Taggard, and it is in analogy with the former practice of pleading at law.[5]

Much that was said, in regard to the facts necessary to be stated in the plaintiff's complaint, ante, pages 136 to 174, may be applied to the statement of new

[1] This agrees with the cases cited supra, Graham *v.* Stone, 6 How. Pr. R. 15, Lewis *v.* Kendall, id. 59, Sayles *v.* Wooden, id. 84, Anibal *v.* Hunter, id. 255, and others.

[2] 7 Barb. S. C. R. 80. 3 How. Pr. R. 358, and see preceding chap. on Complaint.

[3] 6 How. Pr. R. 196, 1 C. R., N. S. 316, per WILLARD, J. See also Willis *v.* Taggard, 6 How. Pr. R. 433, 1 Wend. 347, 1 Denio, 147.

[4] 6 Hill. 421, 1 Wend. 347, 1 Denio, 147.

[5] 6 How. Pr. R. 433.

matter in the defendant's answer. In respect to the set-off of the defendant, and every other species of counter claim, constituting a ground for affirmative relief, these rules, of course, apply; this part of the subject, however, will be considered in the following section. So also as to any other matter of defence constituting a discharge or a bar to the plaintiff's cause of action; all the *facts* must be pleaded, which the defendant will be bound to establish by *evidence*, to constitute the bar; but the facts themselves, and not the evidence, must be pleaded. In causes of action that heretofore have been denominated *legal*, it will generally be sufficient to state these facts substantially, as in a special plea, without regard to form. Thus, if the defendant relies upon the statute of limitations, which he is obliged to set up in his answer,[1] it is not enough for him to say that he pleads the statute of limitations, but he should state the facts constituting the defence in the usual way, that the "cause of action mentioned in the plaintiff's complaint did not accrue to the plaintiff at any time within six years next before the commencement of the action." So, too, if he desire to avail himself of the defence of *tender*, he must state such facts as he will be bound to prove on the trial to constitute the defence. As for example: that after the money mentioned in the complaint became due, and before the commencement of the action, he offered and tendered to pay the plaintiff the said sum of money, which the plaintiff refused. So also in the case of a tender of amends for a casual or involuntary trespass

[1] Am. Code, § 74.

under the statute, and of any other defence to an action, whether on contract or for a wrong, the facts *necessary* and *essential* to be proved, in order to constitute the defence, should be stated, in order to their admission under the pleadings. We do not say that an omission to state all these facts, will, in every case, be fatal on the trial, or necessarily shut out the evidence. Doubtless the court has a large discretion under the Code; and, indeed, is required by section 176[1] to disregard any *defect in the pleadings which shall not affect the substantial rights of the adverse party.*[2] In such a case, a party undertaking to plead a tender, accord and satisfaction, release, or any other new matter of defence, whether legal or equitable, ought not to be prejudiced by any defect or omission, even of a material allegation, if it has not actually misled or operated to the prejudice of the adverse party. As for example: if it has failed to apprise him of some fact which he had a right to know, or some matter upon which the defendant relies to sustain his general allegation; and which, by a failure to set it out, the plaintiff may not be prepared with proof to controvert.[3] Thus, in the case of M'Murray *v.* Thomas, the mere allegation of fraud, without averring the facts to establish it, failed to apprise the plaintiff of the particular matters upon which the defendant relied, and which the plaintiff had a right to know. So, too, in the case of Gould *v.* Homer,[4] and Fay *v.* Grimsteed,[5] setting up the defence of usury.

[1] Am. Code, also § 169, 170.

[2] And see further, post, chap. ix., Amendments.

[3] 5 How. Pr. R. 14.

[4] 1 C. R., N. S. 356.

[5] 10 Barb. S. C. R. 321.

And the same rule has been frequently applied in equity. To allow usury to be given in evidence, the defence, says the Chancellor, must be distinctly set up in the plea or answer, "and the terms of the usurious contract, and the *quantum* of the usurious interest, or premium, must be specified, and distinctly and correctly set out."[1] And a plea for want of parties in Chancery, must not only set out the defect of parties, but must point out the parties who should be joined.[2]

Under the Code, as has been noticed, an answer that the plaintiffs are not joint owners of personal property in an action for the taking thereof,[3] and an answer that one of the defendants "never was a co-partner," are sufficient.[4] Where, however, the answer is that other parties should be joined as parties in interest, the equity rule doubtless applies, and the defendant must specify the names of the parties and their interest.

It should also be remembered that, however wide the discretion of the court, and however liberal the Code in respect to disregarding omissions and defects in the pleadings, &c., yet there is a limit to this discretion and liberality; for the Code has made a provision which the courts are not at liberty to disregard, that: Where the allegation of the cause of action or defence, to which the proof is directed, is unproved, not in some particular, or particulars only, but in its *entire scope and meaning*, it shall not be deemed a case of variance, but a failure of proof;[5]

[1] 4 Paige, 533. 7 Id. 457. 8 Id. 17. [2] 13 Ves. 438.
[3] 8 Barb. S. C. R. 144. [4] 1 C. R. 72.
[5] Am. Code, § 171.

and, also, that an error and defect in the pleadings, &c., is to be disregarded only when such defect cannot affect the substantial right of the adverse party.[1]

2. *What may be alleged as new matter.*—Having thus considered what matters *must* be alleged in the answer by the defendant, I shall next briefly notice what *may* be alleged in his defence, or not, as he may think proper.

Under a general or special denial, as we have seen,[2] no evidence can be given on the part of the defendant, except such as tends directly to disprove some material fact controverted in the complaint. This doctrine, very clearly and logically laid down in the case of Benedict *v.* Seymour, cited supra,[3] agrees with most of the decisions on this point made since the Code, and is no doubt entirely correct. In the same case, however, the question was considered, whether it is admissible to set forth specially any defence which *may* be given in evidence under such a traverse, and the conclusion arrived at, that *every special* defence consisting of matter which goes to disprove any material allegation in the complaint is defective, and must be stricken out on motion.[4] Whether this rule was ever strictly applicable to the theory of pleadings under the Code, or not, it seems to me clearly evident, that since the late amendments, it cannot, and ought not, to be rigidly applied. There can certainly be no reasonable objection, as was stated, ante, pages 261, 262, to allow the

[1] Am. Code, § 176.
[2] Ante, pages 237, 238.
[3] 6 How. Pr. R. 298.
[4] 6 How. Pr. R. 307.

defendant, with his general or specific denial, to set forth specially, as formerly he might do with the general issue, either by notice or special plea, such defences as duress, statute of frauds, illegality of consideration, payment, or any other defence not absolutely *inconsistent* with the denial, even though some of these defences might properly be given in evidence under a mere traverse. A plea amounting to the general issue, it has been observed, was mere matter of form, not of substance, and as such, therefore, could be reached only by special demurrer. An example is given in an action of *trover*, where the defendant pleads that the plaintiff consigned him the goods to sell, which he sold pursuant to the order of the plaintiff; this was held bad as amounting to the general issue;[1] but, being mere matter of form, it could not probably be reached by demurrer under the Code. The plaintiff cannot certainly, in any sense, be said to be "aggrieved"[2] by such a defence, if it be matter really proper to be proved in bar of the action. In such case the answer apprises him of the exact point of the defence set up, in the shape of new matter. As the Code now stands, he is not required to controvert it by any reply, but the matter is deemed to be controverted, and the defendant must prove it. He *may*, therefore, I think, properly allege it as new matter, with or without his general or specific

[1] 10 John. 289.

[2] There is much force in what was said in Hynds v. Griswold, 4 How. 69, as applicable to such a case. Effect should be given to the word *aggrieved*, as used in the 160th section of the Code.

denial, nor should such a defence be struck out merely because it amounts to the general issue.[1]

Equitable defence to legal cause of action.—It was a question, before the late amendments of the Code, whether a defendant was at liberty to interpose a purely *equitable defence* to a *legal cause of action.* Most of the decisions *pro* and *con* on this subject, have already been cited,[2] and it is unnecessary to refer to them again in this place. The question is now definitively settled by the statute, that the defendant may interpose a purely equitable defence to a legal cause of action. He may set forth as many defences and counterclaims as he has, whether they be such as have been heretofore denominated *legal*, or *equitable, or both.*[3] The defendant may also have positive, or, as the Code denominates it, *affirmative* relief;[4] as, for example, in a suit to have a bond and mortgage delivered up and cancelled, he may, if he make out a sufficient case, have an affirmative judgment of foreclosure; and, therefore, he may, if he choose, set up in his answer any matter which can, in any event, become material to such a result;[5] and see further on this subject the next section, on the *Counterclaim of defendant.*

In setting out an equitable cause of action, or an equitable defence to a legal demand, it has been said

[1] And see further as to what may, and what may not, be alleged, post, under the head of *Irrelevant and redundant matter.*

[2] Ante, chap. 1, § 3. 8 Barb. 103, 9 id. 657, 5 How. Pr. R. 192.

[3] § 152, as amended in 1852. [4] § 274, as amended in 1852.

[5] 5 How. Pr. R. 476.

that the party is not confined to the same strictness of statement as in other cases, but that the equity rules apply, in the main, to the one class of cases, and common law rules to the other. What was said in a former chapter on this subject,[1] may be here referred to in order to avoid an unnecessary repetition. We agree with that class of decisions which hold that there is no such distinction, and that the Code has really provided a uniformity of *pleading*, as well as practice, in all cases. This applies to the defendant's answer of new matter, as well as to the statement by the plaintiff of his cause of action; and, therefore, in strictness, a defendant has no right to set up in an answer, constituting even an equitable defence, any thing except *material facts*, that is, *issuable facts capable of trial*, and which, on being controverted, will form an issue or issues sufficient to admit all proper evidence of the facts necessary to sustain the defence. But, under the practice established by the late amendments of the Code, that new matter (unless a counterclaim) need not be denied by the plaintiff, and is not deemed admitted on the trial, I see no good reason why the rule should be always strictly enforced in case of the defendant's answer, except when a counterclaim is pleaded,[2] so long as the *facts* stated are pertinent to the case, and may *be proved* in support of the issue, even though not directly *issuable facts capable of trial.* The defendant *may*, if he choose, it is presumed, in setting up an equitable, as well as a legal answer, state such facts as cannot either prejudice or "aggrieve" the plaintiff,

[1] Chap. 1, sec. iv., and cases there cited. [2] See next section.

or mislead him in his proof, or encumber the record, or embarrass the proceedings. If, under the equity practice, a plaintiff had a right to know, not only the facts and circumstances of the case relied on by the defendant, but the use designed to be made of them, it would seem that he should still have that right, particularly as he admits nothing of the facts stated, by omitting to reply, and the answer, therefore, cannot be used in any way, as an examination or discovery of evidence.

3. *What facts must not be alleged.*—The right, however, should, at least, be limited by the rule indicated in Wooden *v.* Waffle,[1] so as not to suffer the defendant to encumber the record with details which have no other bearing upon the case than to establish some other fact, affecting the equitable right in controversy. Even where the opposite party may not be "aggrieved," the court has an interest in disencumbering the record of irrelevant and redundant matter, and in reforming abuses in pleading.[2]

Irrelevant and redundant matter in an answer, as in a complaint, may be struck out on motion of any person aggrieved thereby.[3] And though, perhaps, for the reasons already stated,[4] the defendant, (unless his answer sets up a counterclaim,) should not in general be held to so great a strictness as the plaintiff in his complaint, yet it is undoubtedly a general rule that the answer should set up only the facts constituting the ground of defence, and *no more*. The motion to strike out scandalous and impertinent matter

[1] 6 How. Pr. R. 156.
[2] Am. Code, § 160.
[3] 6 How. Pr. R. 156.
[4] And see 4 How. Pr. R. 69.

is entirely similar to an exception for impertinence, under the equity system.[1] Scandalous and impertinent matter, even if not included under the head of irrelevant and redundant matter, as stated in the Code, may still be struck out of the pleadings. This doctrine, applied in the case of Carpenter *v.* West,[2] to scandalous and impertinent matter in a complaint, may be also safely applied to similar matter in an answer.

Facts, also, and not the mere evidence of facts, must be stated as new matter. A statement of evidence, instead of the facts, can answer no possible good end, and is in itself a prolixity and redundance which the court will correct.

The statement of new matter must be, by the Code, not only such as constitutes a defence, but it must be in ordinary and *concise language, without repetition.*[3] A violation of either of these requisites is an abuse which will be corrected by the court, on motion. Under these provisions in Knowles *v.* Gee,[4] JUSTICE SELDEN struck out a large portion of an answer embracing the details of evidence relied on to sustain a charge of fraud. The complaint was for trespass in cutting and carrying away grain, and the answer setting up that the plaintiff's deed to the land was obtained by fraud, went into a history of the transactions between the parties, with the circumstances in detail which led to the delivery of the deed, extending to upwards of sixty folios. Though the cause of

[1] 5 How. Pr. R. 44.

[2] 5 How. Pr. R. 53. See this case cited, ante, page 177.

[3] Am. Code, § 149. [4] 8 Barb. S. C. R. 300.

action or defence, it was said, must be stated fully and clearly, and general pleading is no longer allowed yet, facts only, and not the mere evidence of facts, should be stated.[1]

The facts must also be stated, not only *concisely*, but *without repetition*, and if not so stated the court will correct the abuse. Thus, if the defendant undertake, under the pretence of setting forth several separate defences, to set forth the same defence in different forms, the court will, within the principle of Stockbridge Iron Co. *v.* Mellen,[2] strike out all but one, with costs. What the Code means by "ordinary" language it would be, perhaps, hazardous to say. It is presumed that terms of art, professional expressions, and generally all words *of good standing* in the *English language* may still be used; and it is very doubtful whether any court would descend so far as to criticise the language of a pleading by striking out an ordinary Latin word, or law French term, which has been in use among pleaders for centuries past, unless, indeed, the party objecting should show ignorance on affidavit, or otherwise prove himself "aggrieved" to the satisfaction of the court. A demurrer to the abbreviation *vs.* of the Latin word *versus*, in the title of the complaint, was very properly overruled as frivolous.

In a partition suit, an allegation in the answer that the plaintiff had unreasonably refused to make parti-

[1] Justice Welles allowed an answer of 26 folios to stand, under similar circumstances. Burget *v.* Bissell, 5 How. Pr. R. 192. See remarks on this case, ante, pages 181, 182.

[2] 5 How. Pr. R. 439.

tion by deed, was struck out as irrelevant and redundant. It could have no possible influence upon the action, and if replied to, it was said, it would raise an immaterial issue, and tend to embarrass the proceedings.[1]

And where there are several defendants, an answer by one of them, which is immaterial as between him and the plaintiff, but is intended to form a case for adjudication of equities between him and a codefendant, will be struck out on motion as immaterial, on the question of the plaintiff's right to recover.[2] Immaterial matter, when inserted in an answer, cannot be demurred to; it must be taken advantage of by motion to strike it out as irrelevant and redundant.[3]

A hypothetical answer, or an answer in the alternative, cannot be properly pleaded; as if the defendant, in an action for slander, with a general denial, state, that if he did speak the words, &c., he will then prove something in mitigation or justification;[4] and a separate answer of this description, it seems, is bad for insufficiency on demurrer.[5]

Inconsistent answers are not countenanced under the Code, any more than they were under the old equity system.[6] At common law, a defendant

[1] M'Gown *v.* Morrow, Special Term, per PARKER, J., 3 C. R. 9.

[2] Woodworth *v.* Bellows and others, 4 How. Pr. R. 24.

[3] Id. 2 Sand. 702.

[4] See remarks and cases, cited, ante, pages 201, 202.

[5] 6 How. Pr. R. 84. Id. 401.

[6] The anonymous case reported in 1 C. R. 134, does not seem to be sustained by the later decisions.

could plead only one plea; but by statute he might plead as many separate matters as he should think necessary to his defence, subject to the power of the court to compel him to elect by which plea he would abide in cases where he should plead inconsistent pleas.[1] A defendant could not deny the execution of a deed, or plead the general issue in assumpsit, and also a tender.[2] Nor in trespass could he plead at the same time the general issue, alien enemy, and a justification.[3] And where, in an action of debt on bond, the defendant pleaded payment before the day, and payment at the day, the court ordered the first plea to be struck out.[4] But with the general issue in assumpsit, he might plead infancy, or the statute of limitations, or discharge by bankruptcy; and in trespass to lands, he might, with the plea of not guilty, also plead title in himself, or a third person, or justification.[5]

In equity, a defendant might also set up by answer as many defences as he might have, but not inconsistent defences.[6] In a verified answer, it was held that he could not set up two defences that cannot both be true in fact.[7] He might deny the truth of the allegations of the bill, and set up any other matters not wholly inconsistent with his denial on a full or partial defence.[8] And where from redundant expressions, or other verbal inaccuracy, a defence had

[1] 2 R. S. (3d ed.) p. 448, § 27.
[2] 4 T. R. 194. 5 Id. 97. 4 Taunt. 459.
[3] 12 East. 306.
[4] 1 John., case 152.
[5] Grah. Pr. 245.
[6] 1 Barb. Ch. Pr. 138.
[7] 11 Paige, 46.
[8] 11 Paige, 46.

been rendered inconsistent, when it was evidently not intended to be so, the court would either reject the redundant expressions as surplusage, or direct them to be struck out.[1] This may now be obtained by motion to the court to render the pleading more definite by amendment.

In Boyce *v.* Brown,[2] it was held, that under the Code, the defendant could not plead inconsistent defences. Thus, it was said, that in trespass he could not, as under the old practice, plead a general denial and a justification at the same time, as both could not be true. He should either deny the trespass altogether, or confess it, and justify, or avoid the act. Judgment was given for the plaintiff in that case, not for the insufficiency of the answer, as it contained some facts which, if properly alleged, would have been a defence, but because the answer was not drawn in conformity with the Code, and the plaintiff, as the Code then stood, was not allowed to demur. On appeal, in the same case, the judgment was affirmed.[3] In Arnold *v.* Dimond,[4] it was held, that the defendant cannot set up two defences not consistent with each other, one of which from its nature must be within his personal knowledge; as a carrier to answer:—1st. That he was not the owner of the vessel. 2d. That the property shipped was delivered to the plaintiff.

Where the defences, however, both, or all of them,

[1] 1 Barb. Ch. Pr. 138.

[2] 3 How. Pr. R. 391, at special term, per WILLARD, J.

[3] 7 Barb. S. C. R. 81.

[4] N. Y. Superior Court, 4 Sand. 680.

may be true, though entirely different in their nature, they are not inconsistent. Thus, in Buddington *v.* Davis,[1] it was said, that, while a conditional, or *de bene esse* defence could not be sustained, as in an action for libel, if the defendant should set up that, *if the same was published it was true*, or *was privileged*, yet, that in such action, the defendant might separately *deny*, and *justify;* that is, he might deny all the allegations of the complaint, and then, by a separate statement in the same answer, allege the truth of the publication; and again, by another separate statement, aver that the publication was privileged. *All* these several defences might be true, and proof of one would defeat the action. But in an action for trespass, if the defendant should deny that he committed the trespass, and allege matter in avoidance, as a former recovery for the same trespass, it is manifest that both cannot be true, and the latter is inconsistent with the former.

When inconsistent defences are set up, the defect is properly to be reached by motion to strike out one of the defences, in which case, as under the old practice, the court will either strike out the defence, or compel the defendant to elect by which he will abide.[2]

If a motion to strike out the objectionable matter cannot reach or cure the defect, the objection, it is presumed, may be taken by demurrer, as in the case of Sayles *v.* Wooden,[3] Lewis *v.* Kendall,[4] and others. Such an answer, it seems, is "insufficient" within the

[1] 6 How. Pr. R. 401, per HARRIS, J.

[2] Porter *v.* McCreedy, 1 C. R., N. S. 88.

[3] 6 How. Pr. R. 84. [4] 6 How. Pr. R. 59.

meaning of the Code, and may be objected to by demurrer, for it is held that an answer is insufficient in the sense of the Code, not only where it sets up a defence which is groundless in law, but where in the mode of stating a defence, otherwise valid, it violates those primary and essential rules of pleading which the Code has retained.[1] And the rule is no doubt correctly laid down in the case of Nichols *v.* Jones, that where the objection is to the whole of a separate answer or defence it should be taken by demurrer, unless palpably insufficient, as a frivolous, or irrelevant defence, in which case a motion for judgment on account thereof will be entertained; but if part of such an entire and separate defence may be good, the redundant or superfluous matter incorporated with it should be struck out on motion.[2] A similar view was taken in the case of Fabricotti *v.* Launitz,[3] in the N. Y. Superior Court.

4. *What need not be stated in the answer.*—It is not necessary in an answer, as well as in a complaint, to state matter of which the court takes notice *ex officio;* nor to anticipate a reply, and state matter which would more properly come from the other side; nor to allege what is presumed in law; nor what is necessarily implied. A defendant in equity was not bound to answer a matter stated by way of recital, and not

[1] Fry *v.* Bennett, Sup. Court, N. Y., at General Term, per DUER, J. 1 C. R., N. S. 252. But see *contra* 7 How. Pr. R. 57, and see post, chap. vii. sec. 3.

[2] Per BARCULO, J., 6 How. Pr. R. 355.

[3] 3 Sand. 744.

positively;[1] nor as to the correctness of an arithmetical proposition;[2] nor generally any allegation which was not material for any purpose of the suit.[3] The same is the practice under the Code; neither a prayer for relief, nor a conclusion of law, nor any other matter upon which an issue cannot be taken, and which is not material to the action, need be answered; and a failure to answer will not be deemed an admission of such matters as evidence on the trial.

It was also a well established rule in equity that the defendant was not bound to answer any allegation which, if confessed, would subject him to punishment, penalty, or forfeiture.[4]

The Code, however, limits the privilege to that class of cases only where an admission of the truth of the charge would subject the party to prosecution for a *felony*. In Hill *v.* Miller,[5] in the N. Y. Superior Court, it was held that the defendant need not admit or deny allegations in the complaint which he will state in his answer under oath he might subject himself to a criminal prosecution by answering. The statement, so verified, will put in issue such allegation, and put the plaintiff to proof of his case precisely the same as though an answer had been interposed denying the allegation. The above case held that the rule applied to all cases of criminal prosecutions, such as misdemeanor for assault and battery, &c. This was, however, under the Code of 1849,

[1] 6 Paige, 124. [2] Id. 239.
[3] 3 Barb. Ch. R. 312. 3 Paige, 210.
[4] 4 John. Ch. R. 432. 2 Paige, 599. 3 Id. 528. 16 John. 592.
[5] 2 Sand. 684. See also White *v.* Cummings, 3 Id. 716.

which did not have the clause contained in the Code as it now stands, that *no pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading.*[1] In cases less than felony, therefore, the defendant must still answer under oath if required.[2]

5. *How statement in answer to be made.*—Having considered, *first*, what matters *must* necessarily be stated by the defendant in his answer; *second*, what *may* be alleged by him as new matter; *third*, what *must not* be alleged; and *fourth*, what *need not* be alleged; it remains only to notice briefly how the statement by the defendant of new matter in his answer must be made.

It was remarked, ante, page 193, in considering the manner of stating the facts in the complaint, that much of what was there said would apply to the mode of stating a defence by the defendant in his answer; and it is only necessary now to refer to the remarks on the various matters noticed under that head, without repeating them here in detail.[3] There are, however, one or two matters particularly applicable to the manner of stating a defence, which it will be proper to notice in this place; and first:

Separate defences, how stated.—The Code provides that—

"The defendant may set forth by answer as many defences and counterclaims as he may have, whether they be

[1] Am. Code, § 157.

[2] And see post, sec. v. of this chapter.

[3] Ante, pages 192 to 205.

such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished."[1]

The nature of the defences which may be separately pleaded, has been already in part considered. They are—first, a general or specific denial; second, new matter in avoidance; third, counterclaim. They may be legal or equitable defences, or both; but they must be consistent; that is, they must both, or all, be true, and must not be of such a nature, that if one is proved to be true, the other must necessarily be false.[2]

They must also be separately stated. This is a very important and essential feature in the manner of stating a defence. The provision in the Code is conclusive to show that defences must be *single;* that is, not consisting of a single allegation, or a single material fact, but of a single matter, which, as a whole, and complete in itself, will, if proved, form an entire defence to so much of the complaint as it assumes to answer.[3] And, according to JUSTICE SELDEN, there can be no proper mode of framing an answer in a *common law action* without distinguishing each separate defence by, at least, some appropriate commencement, if not conclusion; as, for example, "and for a further defence, &c."[4]

[1] Am. Code 1852, § 150.

[2] See ante, pages 286, 287.

[3] See Willis *v.* Taggard, 6 How. Pr. R. 433.

[4] Benedict *v.* Seymour, 6 How. Pr. R. 302.

In the leading case of Boyce *v.* Brown,[1] several times above cited, it was said, on appeal to the Supreme Court, by JUSTICE HAND, "As I understand section 150, it is a statutory inhibition against duplicity in stating two defences together. Each defence, or ground of defence, must be separately stated; and this, I think, applies to more than one defence to the same cause of action, as well as to different defences to different causes of action; so that, under the Code as amended by act of April 11, 1849, it may be doubtful whether, what was matter of form before, requiring a special demurrer, is not now matter of substance," &c.[2]

The separate grounds of defence, separately stated as prescribed in section 150, take the place of separate pleas.[3] And see further, as to separate statement of Counterclaim, post, sec. iv. of this chapter.

The defences must not only be separately stated, but they must "refer to the causes of action, which they are intended to answer in such manner that they may be intelligibly distinguished." That is to say, if a complaint contains several distinct causes of action, these are to be separately stated, in substance, similar to the manner of stating the counts in a declaration,[4] and each cause of action must be separately answered. If the defendant have two or more defences to any one cause of action, he may set them

[1] 7 Barb. S. C. R. 80. 3 How. Pr. R. 391.

[2] See on this point, Fry *v.* Bennett, 1 C. R., N. S. 252; and post, chap. vii. sec. 3.

[3] Cobb *v.* Frazee, per GRIDLEY, J., 4 How. Pr. R. 413.

[4] Ante, pages 195 to 198.

forth, but each defence must point out specifically the cause of action to which it is designed to be an answer, as for example, "and as to the cause of action, secondly set forth in the plaintiff's complaint, the defendant for answer, further says, &c.," or in some other way to distinguish it intelligibly.[1] The burden of analyzing the defence, as has been well remarked, is not to be thrown on the court at the trial, nor is the plaintiff bound to take notice of it at his peril. If, instead of observing these rules prescribed for the manner of the statement of a defence, the defendant mingles together two or more statements, each of which would be a sufficient defence, if separately stated, the court will strike out one on motion,[2] or, perhaps, adjudge the pleading bad on demurrer.[3] And similar consequences will result from setting up separately two or more defences to a complaint containing several distinct causes of action, without properly distinguishing as to which cause each defence is intend- to apply. Perhaps, however, in such a case, the proper way would be for the plaintiff to move that the defendant be compelled to make his answer more definite and certain by amendment.

Joint or separate answer.—If there are two or more defendants, each defendant may put in a separate answer in cases where, according to section 274 amended Code, a several judgment may be proper. In equity two or more persons might join in the

[1] And by the late rules of the Supreme Court, each defence is required to be "plainly numbered," see Rule 87.

[2] 6 How. Pr. R. 301.

[3] 1 C. R., N. S. 252, see post, chap. vii. sec. 3.

same answer, and where their interests were the same, and they appeared by the same solicitor, they ought to do so, unless some good reason existed for answering separately.[1] When a joint fiduciary capacity exists, a joint answer should be adopted. But the rule does not apply where the joint parties are liable to account, and incur responsibility, as in the case of executors and trustees.[2] When the interests of the defendants are not the same, they should answer separately.

Where the defendants, if liable at all, are all liable as joint contractors, the answer, as in equity cases, should be joint.[3] If the defendants are severally liable, each may properly appear separately, and answer, as for example, in case the defendants hold different relations to the plaintiffs, such as the maker and endorser of a promissory note, &c. So also where the defence relied on is a mere personal discharge, such as bankruptcy of one joint contractor, infancy, &c.[4] In actions for a wrong or injury as trespass, slander, assault and battery, &c., the plaintiff is allowed to recover against one or more of several defendants, and a several judgment is always proper. Each of the defendants, therefore, may answer severally, and by the same or by different

[1] 1 Barb. Ch. Pr. 158.

[2] Id. 157.

[3] "Each defendant is at liberty to use such plea as he may think proper for his defence, and they may either join in the same plea or sever at their discretion." Such was the rule at common law. Steph. Pl. 257.

[4] How. Pr. R. 272. 1 Chit. Pl. 35.

attorneys. Where, however, two defendants answer separately by the same attorney, and verdict and judgment are given in their favor, but one bill of costs will be allowed.[1] And where two defendants answer separately, by different attorneys, one of whom is a clerk in the office of the other,[2] or who are partners in business,[3] but one bill of costs will be allowed; otherwise if not partners.[4]

If one or more of the defendants fail to answer in cases where a several judgment may be proper, the court will render judgment against them leaving the issues raised by the answer of the defendant or defendants who appear, to be tried.[5] But an answer put in by one of several defendants must be material on the question *of the plaintiff's right to recover;* it cannot set up equities to be adjusted between him and a co-defendant, pursuant to section 274 of the Code.[6] And in rendering a judgment under this section, which shall determine the rights of the plaintiffs or defendants, as between themselves, the defendant claiming such judgment as against a co-defendant, must actually appear as a litigating party in court.[7] It seems to be proper, under the Code,

[1] Tracy *v.* Stone, 4 How. Pr. R. 104.

[2] 6 How. Pr. R. 404. [3] 6 How. Pr. R. 9.

[4] 5 Id. 336. The N. Y. Superior Court allowed separate bills of costs *against* two defendants defending by the same attorney. 4 Sand. 671; but it was held by the same court, in another case, that but one bill could be allowed *in favor* of two defendants, 3 Sand. 760.

[5] Am. Code, § 274.

[6] Woodworth *v.* Bellows and others; 4 How. Pr. R. 24, per WELLES, J.

[7] Norbury *v.* Seely; 4 How. Pr. R. 73, per HARRIS, J

for a defendant to join, with a sufficient answer barring the plaintiff's right to recover, an answer containing facts, which if proved, will authorize the court to render judgment that he be subrogated in place of the plaintiff, or such other judgment as will determine the equities between him and his co-defendant. Such answer, however, should not be allowed, if calculated to prejudice or delay the plaintiff in collecting his demand, and it would seem to be but just that in such case the court should require the truth of the defence as against the plaintiff to be verified by affidavit.

And generally all matters of defence set up should be *true*. Under the old system of pleading, it was very quaintly but correctly remarked that, "truth is not properly a quality of pleading,"[1] and though a cardinal rule was, that the pleadings ought to be true, yet in general, there was no means of *enforcing* this rule, because, regularly, there was no proper way of proving the falsehood of an allegation till issue had been taken and trial had upon it.[2] The science of pleadings, it was said, had no rules whereby truth could be ascertained.[3] The original code attempted to remedy this defect in part, by requiring a *verification* to all pleadings, and thus bringing down the allegations to the compass of ordinary probability, if not of absolute truth. The verification being now optional with the plaintiff, a false or sham answer may, of course, still be put in. But the Code has provided a way to *enforce* the rule requiring truth in pleading, by arming

[1] Evans on Pl. 96. [2] Steph. on Pl. 441. [3] Id.

the court with power to strike out such *sham* answer and render judgment in a summary manner, on motion.[1]

SECTION IV.

COUNTERCLAIM.

THE word "counterclaim" is introduced into the Code by the amendments of 1852. As the section now stands,[2] the answer must contain, besides a general or specific denial of the allegations which the defendant intends to controvert,

2d. "A statement of any new matter constituting a defence *or counterclaim*,[3] in ordinary and concise language, without repetition."

Besides this provision, the amendments of 1852 introduced into the Code the following new definition:

"The counterclaim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action:

"1. A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action.

[1] Post, § vi. of this chapter. [2] Sec. 149, Am. Code.

[3] The word "counterclaim" is substituted in place of "set-off."

"2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

The latter subdivision evidently embraces that class of defences to an action usually denominated set-off. The former, other cases of cross demand between the parties growing out of the subject matter of the suit.

What is a counterclaim.—It may be important to know the exact definition of the term "counterclaim," as used in the Code, and what species of defences it was intended to embrace; for, as will be noticed more at large in the next chapter, it is only in case the defence set up is a "counterclaim" that a reply is now necessary. It may, perhaps, in the absence of all judicial construction on this new provision of the Code, be difficult to define correctly and with precision the exact legal definition of the term "counterclaim." It undoubtedly embraces what was formerly known as set-off, and also recoupment of damages in those cases where such matter of recoupment would have been the subject of a cross action. But it has also evidently a wider and more extended signification, and embracing matters which heretofore have been classed as purely equitable, and could not have been interposed to an action at law, or directly in a suit in equity; it is intended to apply to every defence which heretofore would have been the subject of a cross suit, equitable as well as legal, such not only as go to defeat the plaintiff's action merely, but such as ask affirmative relief for the defendant, limited only, in cases other than a set-off on contract, by the re-

striction that such defence must arise out of, or be connected with, the subject of the plaintiff's demand.

It may be proper here to observe that the portion of the Code above quoted, relative to the "counterclaim," is identical with the provisions on that subject contained in the report of the Commissioners to the Legislature of 1850, which was printed, but never acted on by that body.[1] In order to elucidate more clearly the nature of the counterclaim as intended by the commissioners, we shall quote the following from their explanatory note to the section in question:—

"The statute of set-off was the first innovation upon the common law. That, however, was quite limited in its operation. Of late years the courts have let in a new set of cross demands under the name of *recoupment*. We propose in this section to open the door still wider, and to admit many cross demands now excluded. Further experience may show that the door should be open wider still.

"The first subdivision of this section is intended to remove a doubt, which has been sometimes expressed, whether affirmative relief can be given upon an answer setting up a defence which heretofore would have been accounted equitable only. For example, in the case of an action to dispossess an occupant of land; the defendant claims to occupy under a contract to purchase, and asks on his part for a judgment that the plaintiff give him a conveyance. It is the intention of the Code that the whole controversy between the parties should be settled in one action, and that either plaintiff or defendant should have such relief as the nature of the case requires. It is as easy to do this, as it is to decide upon what was considered a mere equitable defence to a legal demand, and there is no difficulty in either.

"Suppose an action upon a written agreement to recover

[1] See Report, § 645, sub. 2 and § 646.

damages for not performing it. The defendant answers that the writing does not express the intention of the parties, and that he did perform it according to the real agreement between them. Is such a defence admissible under the Code? That question involves another, which is this: is the agreement by the law of the land binding upon the defendant as it stands, or is it not? Now, if it be not binding; that is, if, before the Code, he could, by any form of action get rid of it, he can do so now in the action prosecuted under the Code. The effect of the Code is to open the door to remedies without disturbing rights. It has not changed the rights of the parties. It has simplified and shortened their remedies."[1]

From these remarks of the commissioners, we gain a tolerably clear idea of the nature and extent of the "counterclaim" as used in the Code. It is intended to embrace;—

First. Matters which, by the statute, might heretofore have been interposed by way of set-off in an action on contract, and also, in such action, any other damages, liquidated or unliquidated, accrued at the commencement of the action, arising on a contract, either between the parties to the action or the defendant and any assignor of a thing in action within the provisions of section 112 of the Code.

Second. Matters which heretofore might have been given in evidence in recoupment of damages, and which would have been the subject of a cross action by the defendant against the plaintiff.

Third. Any other matter of defence, legal or equitable, whereby, by "the law of the land," the defendant would have been enabled, in any form of action, legal or equitable, not only to defeat the plaintiff's

[1] Report of the Commissioners complete, pages 267, 268.

claim, but to have obtained *affirmative relief* in respect to some matter growing out of, or connected with, such claim.

And *Fourth.* Any matter arising out of, or connected with, the subject of the plaintiff's action, which, though not a complete defence thereto, might have been the ground of another action by the defendant against the plaintiff for damages or specific relief.

The object of this provision of the "counterclaim" is, as the commissioners have expressed it, to prevent the "inconvenience of having several law suits where one would answer the purpose."

In respect to the set-off, or a cause of action arising on contract, it is to be observed that the demand must exist at the time of the commencement of the action. This is in accordance with the rule existing before the Code.[1] But in other respects the Code has enlarged the privilege of set-off beyond what the statute permitted. Thus, by reference to the statute of set-off, it will be seen that a demand to be set-off must be, not only one arising upon judgment or contract, but must be "a demand for real estate sold, or for personal property sold, or for money paid, or services done, or if it be not such a demand, the amount must *be liquidated*, or be capable of being *ascertained by calculation*;" and it could be allowed only in "actions founded upon demands which could themselves be the subject of set-off according to law."[2]

[1] 3 John. 145. 9 Id. 322. 6 Hill, 10. 2 R. S. (3d ed.) 450, § 39, sub. 4.

[2] 2 R. S. (3d ed.) 450, § 39.

And in equity, in suits for the payment or recovery of money, set-offs were allowed in the same manner and with like effect as in actions at law.[1]

Thus, when the suit was upon an unliquidated demand, as a bond of indemnity, no set-off was allowed.[2] There could be no set-off for a landlord's breach of covenant or agreement in his lease; the remedy being by cross action.[3] Though the tenant, it seems, might recoup damages for a breach of an agreement by the landlord to repair.[4] A set-off was not admissible in an action on contract for a breach of warranty.[5] And generally in all cases where the damages were uncertain or unliquidated, except for real estate or personal property sold, or money paid, or services done, no set-off could be allowed.[6]

The Code, however, permits a set-off under the name of "counterclaim" in all these various cases. The defendant may set-off in all cases. "In an action arising on contract, *any other cause of action also arising on contract*," no matter whether it be liquidated or unliquidated, whether it be damages for breach of warranty or any other contract, and no matter what the nature of the contract be on which the plaintiff seeks to recover, whether for the breach of a bond of indemnity, or any other unliquidated demand. But the Code does not allow a set-off on contract in an action for a wrong, and the rule in that respect remains as it stood before.[7] So,

[1] 2 R. S. (3d ed.) 450, § 64.
[2] 1 Sand. 254. [3] 12 Wend. 529. 15 Id. 559.
[4] 7 Hill 53. 2 Coms. 283. [5] 11 Wend. 584.
[6] 2 John. 150. [7] 3 Cai. 84.

too, it is presumed, the other provision of the revised statutes, relative to set-offs, are not affected by the Code, namely, that the set-off must be due to the defendant in his own right, either as original creditor or assignee; and that if there be several defendants, the demands set-off must be due to them all jointly (or by the Code, such of them as may be entitled to a several judgment);[1] and if the plaintiff be a trustee, so much of the demand existing against those whom the plaintiff represents, or for whose benefit the action is brought, may be set-off as will satisfy the plaintiff's debt, &c., &c.[2]

As to matters in recoupment of damages.—These also constitute counterclaims, and though, under the old system, governed by different principles from those of a set-off, are entirely similar under the Code. Thus, under the former practice, though, in an action on contract for labor at a stipulated price per day, the defendant could not set-off a breach of the plaintiff's implied contract that the work should be faithfully performed, yet he might prove in recoupment, or mitigation of damages, the unskilful or unfaithful performance.[3] So, too, a breach of warranty might be given in evidence by way of recoupment in an action by the vendor for the price of the article sold.[4] But recoupment was merely in mitigation of damages or in defeat of the action, and a balance could not be certified in favor of a defendant.[5]

[1] By the first subdivision of § 150, the counterclaim must be "*in favor of a defendant and against a plaintiff between whom a several judgment might be had.*"

[2] 2 R. S. (3d ed.) p. 450, § 39. See also § 112, Am. Code.

[3] 14 John. 377. [4] 8 Wend. 109 [5] 14 Id. 257.

Recoupment being in the nature of a cross-action was never pleaded in bar.[1] But it may be pleaded under the Code, although not claimed as a full defence to the action.[2] It was always founded on a contract; the right of the plaintiff to sue was admitted, and the defendant instead of bringing a new action against the plaintiff for damages sustained by reason of a breach of another branch of the same contract, was permitted in the same action to *recoup*, that is, cut off, or keep back, so much of the plaintiff's claim. If the defendant's damages exceeded those of the plaintiff, he was necessarily driven to his cross-action, for he could have no affirmative relief. The defendant, it was said, in Batterman *v.* Pierce,[3] might recoup "where the demands of both parties spring out of the same contract or transaction, although the damages on both sides are unliquidated;" though in Cram *v.* Dresser,[4] the word "transaction," as here used, was said to denote nothing more than the contract itself and its accessories, and the Superior Court of N. Y. in an action to recover rent on a lease, refused to allow the tenant to recoup damages occasioned by tortious acts of the landlord's servant entering to make repairs under a stipulation to that effect in the lease. The injury, it was said, did not arise out of the breach of any covenant or stipulation of the contract, which was the foundation of the suit.[5] The definition used by the Code is still broader than that in Batterman *v.* Pierce, or, indeed, in any

[1] 2 Coms. 282. [2] Willis *v.* Taggard, 6 How. Pr. R. 433.
[3] 3 Hill, 171, per BRONSON, J. [4] 2 Sand. 120.
[5] See also 22 Wend. 155.

adjudged case in this state, and would, it is thought, admit such a defence as was shut out in Cram *v.* Dresser, supra. The language is, "arising out of the contract or transaction set forth, &c., or *connected with the subject of the action.*" The words in italics are somewhat vague and indefinite. It is difficult, in the absence of any judicial construction, to say how far they were intended to extend, and whether designed merely as a qualification of the clause immediately preceding, or whether as an independent proposition, allowing any defence, no matter whether arising out of the contract or not, so that it be, however remotely, "connected with the subject" matter of the action. I should be slow to believe the latter could have been intended; as for example, that in an action for the price of land sold the defendant could set up a trespass by the plaintiff at a subsequent time on the same lands; or in an action to recover the possession of personal property, the defendant could set up and claim judgment upon a promissory note given by the plaintiff for the same property. The words, "subject of the action" should, perhaps, be construed not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and ground of the plaintiff's right to recover, or obtain the relief he asks. Anything *necessarily* connected with, that is growing out of, or the direct result of, the contract, or the transactions which the plaintiff alleges as the ground of his demand, may, if a proper subject for a cross-action by the defendant, be set up as a counterclaim; but the defendant should be able to trace the origin of his right or

claim for relief to the transaction itself which furnishes the plaintiff his ground of action. The "subject of the action," in a suit to recover real property, is not the *land* itself but *the possession.* In an action for the price of a chattel, the "subject of the action" is not the chattel, but the contract for its sale. A subsequent injury by the plaintiff to the chattel itself would not, therefore, if this position is correct, be a counterclaim "connected with the subject of the action" which the defendant might set up in his defence; the claim must be connected with the contract of sale. The conclusion drawn from this view of the case is, that the words, "*connected with the subject of the action*" as used in the section of the Code under consideration, are used merely to qualify the words which immediately precede them. Though the effect of the whole section, therefore, is no doubt, as the commissioners express it, "to open the door still wider and admit many cross-demands now excluded," yet it could not have been intended to admit distinct and independent torts to property, or other claims for damages to be set up as a defence in actions on contract, or other actions affecting the same property, where such defence does not arise out of some part of the transaction which the plaintiff alleges as the ground of his demand.

With this limitation, any matter may now be given in recoupment of damages which exists in favor of a defendant, and against a plaintiff, between whom a several judgment may be had. And if the defendant's damages exceed the plaintiff's demand, he may, doubtless, within the meaning of section 274, as amended, have a judgment for the balance.

Other subjects of cross-action and for specific relief. —The section under consideration is broad enough to include every variety of claim, whether legal or equitable, which the defendant, within the limits above mentioned, may have against the plaintiff, and of which on his part he could have availed himself in a separate action. Thus in an action founded on a legal title to recover the possession of land, the defendant may now set up an equitable right to a conveyance from the plaintiff, and if he prove himself equitably the owner, with right of possession, and entitled to the conveyance from the plaintiff, he will not only defeat the action, but may obtain his affirmative relief. The contrary was held before the amendments in Hill *v.* McCurthy,[1] and in Crary *v.* Goodman.[2]

In Otis *v.* Sill,[3] it was denied that a specific lien on property could be enforced in an action for taking the same property, or that such a defence could be set up in such an action, the remedy being purely equitable. But now, in such an action, a defendant may set up his lien in defeat of the plaintiff's right to recover and claim its enforcement, precisely as he might heretofore have obtained such relief by a suit in equity.

In Averill *v.* Taylor,[4] it was intimated but not decided that in an action to restrain a statute foreclosure of a mortgage, and to have the bond and mortgage delivered up and cancelled, the defendant, if he succeeded in his defence, might have a judgment

[1] 1 C. R. 49.
[2] 9 Barb. S. C. R. 103.
[3] 9 Barb. S. C. R. 657.
[4] 5 How. Pr. R. 476.

for the foreclosure of a mortgage. This, it is certain, he may now have. So too the converse would be true, that in an action to foreclose a mortgage, a defendant may set up facts, shewing himself equitably entitled to have the bond and mortgage delivered up and cancelled.

So also in an action to recover back money paid on a contract for the sale of lands, the defendant may set up the contract and the fact showing his full performance, not only in defeat of the action, but as the ground of his own claim against the plaintiff for a specific performance of the contract. And in an action for breach of a covenant in a deed, or condition in an agreement, the defendant may set up by way of counterclaim, a mistake, &c., in the instrument on which the action is founded, and demand that it be reformed or corrected; or in an action for the partition of land, the defendant may set up his own exclusive title and right of possession, by way of claiming judgment in the same action, for the recovery of the possession; or in a suit to perpetuate the possession and enjoyment of real property, and confirm a title where there has been a loss or destruction of the deed or will, the defendant may deny the title alleged, and set up his own exclusive right of possession and enjoyment.

And generally, it seems, that whatever was heretofore the proper subject of a cross-bill in equity *for relief*, may now be set up by way of counterclaim in the action. Set offs were allowed in equity, as at law by statute; but the defendant, if he had any affirmative relief to obtain, founded on any collateral

claim, and touching the matters in suit, must get it in the shape of a cross suit, and could not set it up in his answer. A cross bill, however, was generally considered a defence, and the original cause and cross-bill, but one suit;[1] the time for filing the cross-bill was at the time of putting in the answer, and the defendant might have an order, when both causes were at issue, that they be heard together.[2] A cross-bill was only necessary when the defendant was entitled to some affirmative relief. It was held not necessary in the foreclosure of a mortgage in fee, when the answer of one defendant alleged a prior life estate in himself.[3] A cross-bill could not introduce new and distinct matters, not embraced in the original bill;[4] and it was founded always upon matters in question in the original suit,[5] and was necessary when the defendant was entitled to some positive relief beyond what the scope of the complainant's suit will afford.[6] Thus to a bill brought to enforce a contract, a cross-bill to rescind a different contract respecting the same property would not lie. But where the vender of land among other things in his bill asserted a lien for the purchase money against an assignee of his covenant for a title, the latter might maintain a cross-bill for a recision of that contract.[7] It lay in a suit for specific performance of an agreement, to have the agreement delivered up and cancelled; also, in a bill filed to set aside an agreement

[1] 7 John. Ch. R. 252, 8 Cow. 361.
[2] 2 Barb. Ch. Pr. 129, 135. [3] 3 Barb. S. C. R. 151.
[4] Hopk. R. 48.
[5] Mitf. Eq. Pl. 81, Coop. Eq. Pl. 85.
[6] 9 Cowen, 747. [7] 1 Dana, 589.

or conveyance, it lay to have the agreement or conveyance established.[1]

All these various matters, which, under the equity practice, were proper subjects for a cross-bill, where the object was for relief and not discovery, are supposed to be within the definition of the term counterclaim, as used in the Code, and may be set up by the defendant in the action. It will be impossible to undertake a particular enumeration of the cases in which the cross-bill might be proper in equity, or in which, under our present practice, the counterclaim, which seems to be its substitute, may be used. The above general remarks may perhaps serve to give something of an idea of its nature and use. It is to be observed, however, that the counterclaim, in one respect at least, is more extensive than the cross-bill. The latter would lie only for *equitable relief*. If it were brought for a mere legal title, which is the subject of an ejectment, it would be dismissed.[2] This rule can have no application under the system adopted by the Code.

Counterclaim, how stated.—The defendant should set forth his counterclaim substantially in the same manner as the matter of a complaint, except in the mere formal matter of the commencement, as, for example: "And for a further answer to the plaintiff's complaint, [or to the first cause of action set forth in the complaint] the defendant says," &c. A cross-bill filed for collateral relief differed in no respect from the common form of an original bill, but

[1] 2 Barb. Ch. Pr. 128.

[2] 2 Barb. Ch. Pr. 128.

stated the injury sought to be redressed. The rules, therefore, heretofore given, and generally the remarks made, ante, chapter iv., section 2, are in all respects applicable to the mode and manner of stating the defendant's counterclaim.

The counterclaim is substantially in the nature of a new action; it is an independent cause of action in itself, and should be required to be stated with the same distinctness, precision, and certainty as the matter in the complaint. If controverted by the plaintiff it is required to be denied by a reply. The same rules, therefore, as to duplicity, hypothetical pleading, striking out redundant and irrelevant matter, &c. &c., will apply.

Recoupment of damages, as we have seen, could not, in an action at law, be pleaded,[1] but might be given in evidence under the general issue, with a notice of such evidence; but such a defence should now be set up or pleaded as a counterclaim, substantially, in the manner that the party intending to avail himself of it would state it in his complaint in an independent action.[2] The mere fact that the defendant has commenced an action for damages on the same claim which has not proceeded to trial or judgment, is not necessarily a bar to his setting up the same matter in the answer by way of recoupment; and it has been so held under the Code,[3] though he cannot recover such damages, and also have a cross action.

If a defence be founded on a written instrument, for the payment of money only, it will be sufficient to set out a copy of the instrument, and to state the

[1] 2 Coms. 252.
[2] Willis v. Taggard, 6 How. Pr. R. 433.
[3] 3 Sand. 744.

sum due and claimed thereon.[1] But this also should be understood with the limitation recognized in Lord *v.* Cheesborough, supra,[2] that the present defendant must, by some proper averment in the answer, show himself entitled to recover on such instrument against the present plaintiff; and see also on this subject, ante, pages 142 to 145.

It was very properly said in Willis *v.* Taggard,[3] that an answer which does not profess to set up a full defence, such as set-off or recoupment of damages, is proper under the Code, and is not subject to demurrer. An answer, like a plea, should answer all that it professes to answer and no more. If it claim to set up a full defence and fall short of it, it is demurrable. But if it profess to be only a partial defence, it will be held good under the Code.

In Ranney *v.* Smith,[4] a set-off was held to be a defence within the meaning of section 150 requiring defences to be separately stated and to refer to the causes of action which they were intended to answer. In that case, a set-off was alleged, consisting of sundry items, among which were four notes, on which the defendant claimed the plaintiff was indebted to him in the sum of five hundred dollars, setting forth copies of the notes. The answer then alleged a judgment against the plaintiff as a set-off, and a chattel mortgage. The court denied a motion to strike out or set aside that part of the answer relative to the notes,

[1] Am. Code, § 162.

[2] 1 C. R., N. S. 252. 4 Sand. 696.

[3] 6 How. Pr. R. 433. Special Term, per WILLARD, J.

[4] 6 How. Pr. R. 421. Special Term, per MARVIN, J.

mainly on the ground that by the amendment to section 162 the defendant was at liberty to set-out a copy of the note as his statement of demand, and that the copies of these notes were "separate" statements within the meaning of section 150. In relation to the manner of stating a defence by way of set-off generally, the rule was very clearly laid down by the court in that case, as follows: "That the answer stating the defence of set-off should state, as new matter, the facts constituting the cause of action or demand against the plaintiff as a set-off in the same manner, and with the same particularity, as those facts would be stated in a complaint. And when two or more notes, judgments, or bonds, or other distinct demands, are intended to be set off, each of them should be separately and particularly described, with all the allegations or averments necessary to show the liability of the plaintiff, and so as to enable him in his reply to take issue by denying any of the material allegations pertaining to each note, judgment, or bond, or other particular demand; or to avoid the same by alleging new matter. But all demands constituting the set-off may be contained in the *same statement of new matter* in the answer. Each demand, which in a complaint should be separately stated, as constituting by itself a cause of action, being separately described or stated with the necessary averments, and all constituting the defence of set-off."

In case a set-off is relied on as a counterclaim, the nature and extent of it should be clearly and distinctly stated. It is not sufficient to allege that the plaintiff, previous to the accruing of the demand set

forth in the complaint, was indebted to the defendant on account of previous transactions, in a sum of money equal to the sum claimed by the plaintiff, as will appear by the account current rendered by the plaintiff. Under an order to make such an answer more definite and certain by amendment, the defendant alleged the set-off to be for work and labor, and for goods, wares, and merchandize, and for money lent, paid, and expended, in the language of the common counts under the old practice. The answer was held bad, and a motion to strike out granted, with costs.[1]

SECTION V.

VERIFICATION OF THE ANSWER.

In considering the subject of the verification to the plaintiff's complaint, ante, Chap. iv., Sec. iv., the form and manner of the verification in general, was considered, and the consequences of a defective verification. These remarks are, in the main, applicable to the verification on the part of the defendant. It will be proper in this section to notice, briefly, one or two

[1] Higgins v. Gans, N. Y. Superior Court, per Mason, J., with the concurrence of the other Justices. 3 Sand. 738.

matters in addition, relating particularly to the answer, and first:

Where defendant is privileged from verifying his answer.—Under the original Code of 1848, which required all pleadings to be verified, the party might omit a verification whenever he would be privileged from testifying as a witness to the same matter.[1] It was accordingly held that the verification might be omitted when the court could see that the matter contained in the pleading was such as might aid in forming a chain of testimony to convict him of a criminal offence; the criterion being, not whether the pleading might be used against him in a criminal prosecution, but whether, if called as a witness, he would be excused from answering to the same matter.[2] And it was enough to excuse the verification, if *any* of the parties would be privileged from answering, though other parties might not be so privileged; nor need all the statements in the pleading be such as would excuse the party from testifying as a witness; if any part of the pleading was of such a character it need not be verified.[3]

The Code, as amended in 1849,[4] left it optional with a plaintiff to verify his complaint; but if he did so, the defendant was required to verify his answer also. The section as thus amended contained no clause excusing the party from verifying his answer in certain cases, or providing that the pleading thus verified should not be used against the party on a criminal

[1] Orig. Code, § 133.

[2] Clapper *v.* Fitzgerald, 3 How. Pr. R. 314, per HARRIS, J.

[3] Id.

[4] § 157, Code of 1849.

prosecution, &c. Under the Code, as it thus stood, the N. Y. Superior Court very properly held that a party was privileged under the constitution from being a witness against himself in a criminal prosecution, and he, therefore, need not admit or deny allegations in the complaint, which, he will state in his answer under oath, might subject him to a criminal prosecution. Such statement in the answer, duly verified according to the Code, would put the allegations in issue, and throw the plaintiff on his proof, precisely the same as though an answer had been interposed denying the allegation.[1] The same doctrine was afterward held in another case,[2] with the concurrence of three Judges of the same court; and it was also said that the defendant might decline in this manner to reply to such allegations, and answer the residue. In the former case the rule was applied in an action of assault and battery; in the latter of libel.

The Code of 1851 (which is the same as it now stands) remedied the defect, and supplied the omission in the Code of 1849. It provides that the verification may be omitted when an admission of the truth of the allegation might subject the party to a prosecution *for felony;* and that no pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.[3]

The privilege of a party, therefore, it seems, is now

[1] 2 Sand. 684.

[2] White *v.* Cummings, 3 Sand. 716.

[3] Sec. 157. See whole section as quoted, ante, page 219.

limited by the Code to those cases where his answer to the charge may subject him to *prosecution for felony*, and he will not be excused from answering a mere misdemeanor, as assault and battery, libel, &c. The privilege is much restricted from what it was originally in the Code. Thus, under the original Code, he need not verify the pleading in all cases where he would be "privileged from testifying as a witness;" that is to say where his answer would have a tendency to accuse him of any *crime* or *misdemeanor*, or to expose him to any *penalty* or *forfeiture*,[1] or in certain cases to degrade his character, &c.[2] He is now, it appears, obliged to answer in all these cases less than felony; and, though his answer cannot be used in any *criminal prosecution*, as proof of a fact, yet there is no such restriction in the Code as in the Statute, in the case of a mere *penalty* or *forfeiture*.[2]

Where a party is privileged from verifying his answer to certain allegations in the complaint, which might subject him to prosecution for felony, and there are other material allegations which he would otherwise be bound to answer, the proper course appears to be, if the complaint is sworn to, not to put in a general answer of denial without verification, but to state as to the objectionable allegations that they might, if admitted in evidence against him, tend to subject him to a prosecution for felony, and answer the residue of the allegations verifying the whole, in the manner prescribed by the Code. Such an answer and verifica-

[1] 2 R. S. (3d ed.) 503, § 90.

[2] See Cow. & Hill's Notes, 738 to 749.

Whether the Code or the Statute governs in such case, query?

tion within the case of White *v.* Cummings,[1] would put the allegations in issue, and would be sufficient. Or, if it appear on the face of the complaint that the allegation itself is of such a nature as must tend, if true, to render the defendant liable for felony, he might specifically deny it, and answer the residue, verifying the whole of his answer, except the allegation so denied.

An answer not verified by oath, when an oath was required, it was held, might be treated as a nullity.[2] But a pleading which may be treated as a nullity should be immediately returned, or notice given that it will be disregarded, in order to allow the opposite party to supply the omission, or remedy the defect.[3]

The defendant may verify his answer even though the complaint is not verified, and this, when a counterclaim is set up, will require the plaintiff to verify his reply to such counterclaim.[4]

Separate answers on the part of separate defendants, in case a verification is necessary, must be separately verified. Where there are several defendants, *united in interest*, who answer together, the verification may be by one alone, if such party is within the county where the attorney resides, and capable of making an affidavit, and is *acquainted with the facts*.[5] It is presumed this means *personal knowledge* of the facts set up in the answer, and not mere

[1] 3 Sand. 716.

[2] 1 C. R. 26, 3 How. 280, 6 L. O. 317.

[3] 4 How. Pr. R. 126, 2 Sand. 648, 2 C. R. 15; and as to defective verification, see ante, pages 220, 221, 222.

[4] Levi *v.* Jackeways, 4 How. Pr. R. 126.

[5] Am. Code, § 157.

belief or hearsay; and if generally acquainted with the facts set up in the complaint, doubtless, one of such joint defendants may properly verify an answer, denying all knowledge or information sufficient to form a belief thereof. The affidavit of verification, when made by one defendant, should show affirmatively that he is acquainted with the facts, and how his knowledge thereof is derived. So also when made by an agent or attorney.[1] But it seems in both cases to be sufficient, when nothing is alleged on information and belief, for the verification to be generally that the answer is true, without swearing that the party is acquainted with the facts. If the defendants are severally liable, as in an action where the drawers and endorsers of a bill or note are sued jointly and interpose a joint answer, if the complaint is verified, the answer must also be verified by or on behalf of all the endorsers in the manner prescribed by the Code. So held, per EDMONDS, J., in the case of Alfred and others *v.* Watkins and others.[2]

[1] 5 How. Pr. R. 257, 6 Id. 400. [2] 1 C. R., N. S. 348.

SECTION VI.

SHAM, IRRELEVANT AND FRIVOLOUS ANSWERS AND DEFENCES.

THE original Code provided no way of getting rid of a frivolous answer in a summary way, or of a sham and irrelevant defence. The court, however, for some time before the adoption of the Code had exercised the power of striking out pleas as false,[1] a practice which it is said was founded on the same considerations which lay at the foundation of the practice of striking out frivolous pleas, namely, to guard against the delay.[2] But a plea verified under the rules of the court could not be struck out as false, because the court would not try the matter on affidavits,[3] and the affidavit for the motion was required, not only to allege that the plea was false or frivolous, but to specify wherein the falseness, &c., consisted. If the court was satisfied that such pleas were interposed merely for delay or some other improper motive, and they appeared palpably frivolous, or were shown to be palpably false, they were stricken out,[4] and such also was the practice under the original Code.[5]

[1] Not, however, the plea of the general issue. 2 Cow. 635, 6 Id. 34.

[2] Mier v. Cartlidge, 4 How. Pr. R. 116, 8 Barb. 75, per EDMONDS, J.

[3] 1 Hill, 370.

[4] 1 Hill 370, 18 Wend. 680.

[5] 1 C. R. 38. Id. 72. 3 How. Pr. R. 289.

The amendments of 1849 applied in terms these principles directly to the practice under the Code.

Section 152, provided that:

"Sham answers and defences may be stricken out on motion."

Section 247:

"If a demurrer, answer or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment shall be given accordingly."

The former of these sections was amended in 1851, by the insertion of the following words in italics, so as to read thus:

"Sham *and irrelevant* answers and defences may be stricken out on motion, *and upon such terms as the court may, in their discretion, impose.*"

In Davis *v.* Potter,[1] it was said, that "*sham*" was not used in this section as synonymous with "*false*;" If it were so, the *truth* of every answer might be tested on special motion. It was said in that case, that "it is only where the answer takes issue upon some immaterial averment of the complaint, or sets up new and irrelevant matter, that it can properly be called a *sham* defence";[2] and also, that a *sham* pleading meant nothing different from a *frivolous* pleading, except that the latter did not necessarily imply that its object was evasion or delay.

On the other hand, it is said in the later case of Nichols *v.* Jones,[3] that the essential element of a sham

[1] 4 How. Pr. R. 155.
[2] Id. per PARKER, J.
[3] 6 How. Pr. R. 355.

plea is its *falsity;* and that the true rule to be adopted, under the Code, is to strike out all answers or defences as sham under section 152, when they appear clearly to be false, whether they are good in point of law on their face or not. In the same case it was said, that a *frivolous* answer was quite a different thing:—"It is an answer which, if true, does not contain any defence to any part of the plaintiff's cause of action; and its insufficiency as a defence must be so glaring that the court can determine it, upon bare inspection, without argument. It differs totally from a *sham* answer in this, that the one is always assumed to be true, and the other must always be proved to be false. One is always bad on its face; the other generally good. One is decided by inspection; the other by proof aliunde.[1] The distinction, if any, between a *frivolous* and an *irrelevant* answer was not noticed in this case. But in the very recent case of Harlow *v.* Hamilton,[2] JUSTICE WILLARD defines an irrelevant answer to be one which is good in form and true in fact, but which has no relation to the cause; as, for example, a bankrupt's discharge to an action of slander. It, therefore, differs from a sham answer mainly in this, that the one is true in fact, and the other untrue.[3] Like a frivolous answer, it is to be decided by inspection, and not by proof aliunde, while a sham answer must be proved to be false. The one, it is true, may include the other; for

[1] 6 How. Pr. R. 355, per BARCULO, J. This agrees with Darrow *v.* Miller, 5 How. Pr. R. 247; Seward *v.* Miller, 6 Id. 312; and Brown *v.* Jennison, 3 Sand. 372.

[2] 6 How. Pr. R. 475. [3] Id.

an irrelevant answer, if not pleaded in good faith, but put in from some unworthy object, as for vexation and delay, may be, although the matter stated therein be true, a *sham* defence. But if pleaded in good faith, it may be either a *frivolous* or an *insufficient* answer, in the first of which cases, if palpably insufficient, a motion to strike out may be made; and in the last, if there are reasonable doubts of its insufficiency, the objection should be taken by demurrer.[1]

Although I do not doubt that a *sham* answer or defence necessarily includes a *false* answer, which, had it been true, would have been a valid defence to the action, yet the question is not really of any practical importance. In Mier *v.* Cartledge, at the New York General Term,[2] it was held that an answer not verified, might be struck out as false on motion on affidavits showing its falsity; and that too, notwithstanding it amounted to the general issue. In that case it was said that the power of the court to strike out a plea as false, was not derived from the Code, nor was it regulated or touched by it, but was a power which had for a long time been exercised by the court for good reasons. It was never applied under the former practice to the general issue, because a defendant had a right always to put a plaintiff to proof of his demand, whether he had any pretence for doing so or not, and that was done by pleading the general issue. But under the Code an answer is intended to be the vehicle of substantial defence and not the mere in-

[1] 6 How. Pr. R. 475, Miln *v.* Vose, 4 Sand. 660. See post, chap. vii. § v.

[2] 8 Barb. S. C. R. 75.

strument of a formal obstruction to the progress of a cause. An answer, therefore, denying an allegation in the complaint, might as well be stricken out for falsity as any other reason. It was held in this case, however, (overruling the decision on the same point at special term,[1]) that if the answer was *verified* as required by the Code, a motion to strike it out as false could not be entertained. In this decision, JUSTICE BARCULO, although intimating a different opinion in Nichols *v.* Jones,[2] concurred, and it may be regarded as the settled practice.[3] And in respect to the general question of striking out an answer for falsity, or as a sham answer, we may quote the following from the opinion delivered at the general term, in Mier *v.* Cartledge,[4] as indicating the practice:—"And I fully concur with the court when in 2 Cowen 637, they said they would suffer the pleading to stand upon a very slight suggestion of its truth. We will not try the question on affidavits, and it has never been the practice to require, in answer to such a motion as this, satisfactory evidence of the truth of the plea or answer. A slight suggestion thereof will be enough; a mere probability of its truth, some reason for believing it to be interposed in good faith, may answer. But when it is manifestly false—where its falsehood is conceded, as in 2 Cowen 637, or its falsehood is sworn to on the one side, and on the other no general or special affidavit of merits is produced, and no pretence is made that the plea is true, as in 18 Wend. 567, and in 1 Barn. and Cress. 286, then

[1] 4 How. Pr. R. 115.
[2] 6 How. Pr. R. 360, note.
[3] See also 4 Sand. 660.
[4] 8 Barb. S. C. R. 79.

it is the well settled practice to strike it out; for in such cases it is clear no injustice can be done." This agrees with what was said in Nichols *v.* Jones,[1] and Darrow *v.* Miller,[2] that the falsity must be admitted or clearly established. If it were so plain and palpable as to admit of indisputable proof, as where it appeared by the affidavit of the plaintiff and was not denied by affidavit on the part of the defendant, the defence would be struck out on motion. The evidence of falsity, however, must be clear and indisputable; and an affidavit, on the part of the defendant, of the truth of the answer would be a defence to the motion.[3]

In respect to an irrelevant answer; that is, one which has no substantial relation to the controversy between the parties to the suit; this also is to be stricken out on motion. It appears that a difference is recognized between an *irrelevant* and a *frivolous* answer by the Code, the one being the subject of a motion to strike out by § 152, and the other, of a motion for judgment on account of the frivolousness of the defence by § 247. On a motion to strike out the answer, it has been held that judgment on account of the frivolousness of the answer could not be given. The word "order" in the Code in no case means a judgment.[4] It may, therefore, sometimes be a matter of importance to ascertain whether an answer is *irrelevant* or whether *frivolous*, in order to determine whether to apply for *judgment*, or simply for an

[1] 6 How. Pr. R. 357. [2] Id. 247.

[3] See also Garry *v.* Fowler, 10 L. O. 16.

[4] Darrow *v.* Miller, 5 How. Pr. R. 247, per SILL, J.

order to strike out the pleading on such terms as the court may impose; the defendant to answer, if leave be obtained, within such time as the court may prescribe. JUSTICE STRONG, in Seward *v.* Miller,[1] defined an irrelevant pleading to be one which has no substantial relation to the controversy between the parties to the suit. This, it is evident, may also include a merely frivolous pleading. If, indeed, there exists any substantial difference between the two, so far as the remedy of the party aggrieved is concerned by the Code, it must be that indicated in Darrow *v.* Miller.[2] Thus, an *irrelevant* defence is one which "may be true in point of fact, but is so *impertinent*, or so *grossly frivolous*, that the court cannot but see that the object is to delay or perplex the plaintiff instead of presenting a defence. The objection to such a pleading is the same in principle as that to a pleading which is known to be false; both being a fraud upon the practice of the court, and a mockery of legal proceedings.[3] In such case, the pleading should be struck out from the record; but unless there appear a want of good faith in the pleader, the pleading, though technically *frivolous*, should remain on the record." For a party has a right to have any defence honestly interposed, passed upon, not only in the court of original jurisdiction, but in the court of appeal. In such a case, the remedy of the party alleging the frivolousness of the pleading is, if he desires a summary decision, to move for judgment under section 247 of the Code. There is much force

[1] 6 How. Pr. R. 313.
[2] 5 How. Pr. R. 247.
[3] Id., per SILL, J.

in these views, and if generally adopted as a rule of practice, they might reconcile in a measure the conflicting opinions on this subject. Thus, in case of an irrelevant answer, that is, one which has no substantial relation to the controversy, if it be so grossly impertinent or frivolous that the court cannot but see that it was intended to delay and perplex the plaintiff, it should be struck out on motion. Such, for example, as in an action on contract, if the defendant should set up in defence an equal amount of damages claimed for an assault and battery. But if the irrelevancy is not plainly apparent; that is, if doubts are entertained as to the sufficiency in law of the answer, and the opinion of the court is desired, the answer should be suffered to remain on the record, and the plaintiff to be put to his demurrer.[1] So, too, in case of an answer so grossly frivolous, or manifestly evasive, as to be perfectly apparent that it was not pleaded in good faith, but merely for vexation and delay, it should be struck out as irrelevant and sham;[2] but if not apparently pleaded in bad faith, and yet palpably insufficient in law as a defence, judgment should be applied for under section 247. If, however, the question as to its sufficiency is not perfectly plain, but is the subject for an argument, the plaintiff should be put to his demurrer.

[1] Nichols *v.* Jones, 6 How. Pr. R. 358.

[2] See cases Mott *v.* Burnett, 1 C. R. N. S. 225; Hance *v.* Reming, Id. 204; Richardson *v.* Wilton, 4 Sand. 708.

In Harlow *v.* Hamilton, 6 How. Pr. R. 475, it is intimated that in very gross cases such an answer may be treated as a nullity. The correctness of such a practice, however, may well be doubted.

I understand that a *frivolous* differs from an *irrelevant* answer in this. The first, assuming it to be true, and pertinent to the action, clearly and beyond controversy, constitutes no cause of action or defence, and raises no issue capable of trial between the parties. The second, assuming it also to be true, comprises matters which might constitute a proper cause of action or defence, that is, which are well pleaded in point of form, but which have no possible connection with the subject of the controversy, and, therefore, are manifestly insufficient as a defence to the action.[1]

SECTION VII.

SUPPLEMENTAL ANSWER.

THE defendant is allowed by the court to make a supplemental answer, by leave of the court, alleging material facts occurring after his former answer, or of which he was ignorant when it was made.[2]

This is in place of the cross bill in the nature of a plea *puis darien*, and the supplemental answer in equity, and of the plea *puis darien continuance* at law.

[1] See Harlow *v.* Hamilton, 6 How. Pr. R. 475.

[2] Am. Code, § 72.

In equity, a supplemental answer was allowed to correct an error—as a mistake in a matter of fact, or to set up facts of which the defendant was ignorant, at the time of the answer; or facts which he wished to set up in his answer, but was induced to leave out by the mistaken advice of his counsel.[1] The Code, however, it seems, restricts the right to file a supplemental answer, in all their cases of error, to the one class of facts mentioned in the above section, namely, "of which the party was ignorant when his former pleading was made."

A supplemental answer was also allowed in some cases, to present new matter of defence occurring after the former had been put in. Thus it was held, that where, after answer filed, the defendant obtained an exemption of his person from imprisonment under the act, he might file a supplemental answer to prevent that fact.[2] So where, in a suit for divorce, the complainant commits adultery after the answer of the defendant is put in, she will be permitted, if she applies immediately after the discovery of the fact, to set up that defence by supplemental answer.[3] She might also set up, by cross-bill, in the nature of a plea *puis darien continuance*.[4] And generally, in equity, the defendant should set up new matter of defence, which had arisen after the cause was at issue, by cross-bill in the nature of a plea *puis darien continuance*, and could not do it by supplemental answer,[5] as if the complainant had released the defendant, or there had been an award made on reference after issue joined,

[1] 1 Barb. Ch. Pr. 165.
[2] 4 Paige, 432.
[3] 10 Paige, 485. 11 Id. 18.
[4] Anon. Hopk. 27.
[4] Id. 3 Barb. Ch. R. 613.

&c.[1] The Code doubtless intends to abolish all distinction between a supplemental answer setting up new matter, and a cross-bill in the nature of a plea *puis darien continuance*, and to give the defendant, by supplemental answer, all the relief he could have had in either form of pleading.

At law.—New matter of defence, arising after issue joined, might be pleaded *puis darien continuance*. As that the plaintiff had given a release, or there had been an award after issue joined, or an accord and satisfaction, or when two actions have been brought for the same cause, as against makers and endorsers of a promissory note, judgment satisfied in one suit might be pleaded *puis darien continuance* to the other suit.[2] The plea must properly be interposed before verdict,[3] or report of referees.[4] It might be pleaded on the trial when the cause was called, or at any time after, before the jury have actually delivered their verdict.[5] But an insolvent has been allowed to plead his discharge, even after verdict.[6] The plea was not required to be verified, unless tendered at the circuit,[7] and it was put in without leave of the court. Its effect, when offered at the trial, was to suspend the further proceedings in the cause, on such terms as the court might grant, as to costs. It was, however, in the discretion of the court to receive the plea or not, even after more than one con-

[1] 2 Barb. Ch. Pr. 128.

[2] 5 John. 392. 9 Id. 221. 5 Peters, 232. Gould Pl. 124.

[3] 1 Cowen, 42. Grah. Pr. 296.

[4] 12 John. 218.

[5] 9 John. 392.

[6] 9 John. 250. 1 Wend. 89.

tinuance has intervened, and this discretion, it was said, would be governed by circumstances extrinsic, and which cannot appear on the face of the plea.[1] A plea *puis darien continuance* was not a departure from, but a waiver of the former plea, and no advantage could afterward be taken of it, nor could the plaintiff proceed thereon;[2] but this rule was qualified so as not to apply unless the party abandons the defence before relied on, and assumes a new one.[3] If the plea was only an answer to a part of a claim, or went to one of several counts or causes of action, it was a waiver of prior pleas only, *pro tanto*.[4]

How pleaded.—These rules as modified by the Code, it is presumed are still in force. Thus the Code permits a supplemental answer in the nature of a plea *puis darien*, to be pleaded only on obtaining leave of the court to do so as formerly under the equity practice. Where, therefore, the matter does not arise, or is not discovered, till at the trial, the court will stay proceedings and put the cause over on such terms as may be proper, to enable the defendant to make his motion. The latitude and discretion given by the Code to the courts, in respect to amendments, do not apply, it seems, so far as to allow supplemental answers to be put in, in cases other than those prescribed in section 177. The supplemental answer, it would appear, is not to be used to correct errors or mistakes, as it might have been under the Chancery practice, but is to be confined to its proper sphere of

[1] 10 John. 160. 19 Wend. 639.

[2] 5 Peters, 224. 13 Id. 136, 152. 10 Wend. 675. 14 Id. 161.

[3] 2 Wend. 300. [4] 19 Id. 699.

alleging *facts material to the case* which either occurred after the former answer, or of which the party shall show himself ignorant at the time of the pleading. If the defendant had knowledge of the fact sought to be pleaded at the time of the former pleading, and neglected to do so, he cannot supply the omission by supplemental answer, or even, it seems, unless for very special reasons, by amendment. So held by JUSTICE HAND in Houghton *v.* Skinner, at special term.[1]

The matters which may be thus pleaded, other than those of which the party was ignorant, must be such as occur *after* the former pleading. A defence arising after the commencement of the suit and before answer, should be pleaded in bar of the action.[2] So too any matter of counterclaim, except a set-off in an action of contract. By section 150, Amended Code, the set-off must exist at the time of the commencement of the action. Suppose after suit commenced on contract, and before answer, a cause of action accrues to defendant against the plaintiff for breach of another contract, can he avail himself of such defence in the same suit? The cause of action must exist at the commencement of the suit, and could not therefore be directly pleaded in defence as a counterclaim; but if the breach had occurred *after* answer, might it not be set up as a new fact material to the case in a supplemental answer? Payment may be pleaded *puis darien continuance*,[3] and if made after suit is brought it must be so pleaded.[4] There

[1] 5 How. Pr. R. 420.
[2] 7 John. 399.
[3] 5 Hill, 317.
[4] Denio, 321.

is certainly an equitable right with the defendant independent of the Code, to have a claim against the plaintiff set off, against the plaintiff's demand of a like nature; as in equity one judgment might be set against another, and I do not perceive why such a set off, occurring after the answer, at least in a contract directly between the parties, should not be allowed by way of supplemental answer.

The court, before granting leave to put in a supplemental answer, must be satisfied that the facts to be set up are material to a defence. A release from the defendant to the plaintiff, in an action to recover personal property, cannot be pleaded *puis darien* to the sheriff's action on the replevin bond.[1] A submission to arbitration is merely a discontinuance, and cannot be pleaded.[2] But an arbitration and award, as well as an accord and satisfaction, are defences, and if occurring after the answer, are proper to be set up in the supplemental answer. Nor need it be matter which will constitute an entire defence. It is sufficient if it be a fact material to the case;—a fact which will go towards establishing a defence. Thus, in Rudley *v.* Houghtaling,[3] in an action for assault and battery, JUSTICE PARKER allowed a supplemental answer to be put in, setting up that since the commencement of the suit another action for slander had been commenced by the defendant againt the plaintiff, in which the plaintiff set up the same assault and battery, in mitigation of damages, whereby the verdict was reduced to six cents. "I think," he remarks, "the facts

[1] 12 Wend. 302.
[2] 2 Hill, 387.
[3] 4 How. Pr. R. 251.

which transpired on the former trial, are material to the case. How far they will go toward establishing a defence it is not necessary to say. That question will be decided at the circuit, in such a form as to afford either party an opportunity to review the decision." Leave was granted to put in such answer within ten days, with twenty days to the plaintiff to reply.

A supplemental answer differs from an amended answer. Where one of the defendants transferred to a person not a party to the suit his interest, after the action was commenced, it was held that the plaintiff could not amend his complaint, but must apply for leave to make such person a party by supplemental complaint.[1] The same rule, it is presumed, applies to the answer; the fact, however, must occur after the former answer, and not intermediate the time it was put in and the commencement of the suit. An amended pleading takes the place of and supercedes the original.[2] The defence, by way of supplemental answer, is not a matter of right, but rests in the discretion of the court, if a term has intervened since the happening, and the defendant has neglected to apply at the first opportunity.[3]

[1] 1 C. R., N. S. 180.

[2] 4 How. Pr. R. 174.

[3] 4 John. 255. 10 Id. 161. 19 Wend. 639.

CHAPTER VI.

THE REPLY.

THE object of the Reply under the Code as now amended is merely to controvert and put in issue new matter set up by way of *counterclaim* in the answer. Any other new matter in the answer is, for the purpose of the trial, considered as controverted without any denial on the part of the plaintiff. The subject of the reply will be considered under the following general divisions:—

1st. What the reply must contain and how pleaded.
2d. Verification of the reply.
3d. Frivolous and supplemental reply.

SECTION I.

WHAT THE REPLY MUST CONTAIN AND HOW PLEADED.

THE Code as lately amended contains the following provision in respect to the reply:—

When the answer contains new matter constituting a counterclaim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defence to such new matter in the answer; or he may demur to the same for insufficiency, stating in his demurrer the grounds thereof; and the plaintiff may demur to one or more of several counterclaims set up in the answer, and reply to the residue.[1]

The above language in relation to the denial by the plaintiff of the counterclaim is the same in all respects with that of section 149 respecting the denial by the defendant of the plaintiff's answer, with one exception, namely, that the word "material" is omitted. The answer of the defendant by section 149, must contain a denial of "each *material* allegation," &c. The omission, however, is unimportant; the intention manifestly being to require nothing further by way of denial from the plaintiff in his reply, than from the defendant in his answer.[2] This is the more apparent from the fact that, by section 168,[3] it is only "every *material* allegation of new matter in the answer constituting a counterclaim," not controverted, which is to be taken as true. It is not necessary, therefore, for a party in his reply, any more than in an answer, to controvert, or to confess and avoid, an *immaterial* allegation in the answer, no matter under what form of irrelevant or redundant matter it

[1] Code of 1852, § 153.

[2] 7 L. O. 240.

[3] Am. Code, 1852.

may appear, whether as a conclusion of law, or matters of mere evidence, or other matters of surplusage.

The section above quoted has been amended at every session of the Legislature since the Code, at which amendments have been made. Under the Original Code, the reply was made to contain a *particular* denial of each allegation of the answer controverted by the plaintiff, or of any knowledge thereof sufficient to form a belief; and also "any new matter, not inconsistent with the complaint, in avoidance of the answer.[1] No demurrer was permitted to the reply. The amendment of 1849 retained this language, but permitted the plaintiff to reply "*generally* or particularly," and allowed a demurrer to the reply for "*insufficiency*." It also permitted the plaintiff to demur to one or more defences and answer the residue.[2]

This was amended in 1851, by requiring a *specific* denial to each allegation of new matter, *constituting a defence or set-off;* and authorizing the plaintiff to allege in his complaint "any new matter, not inconsistent with the complaint, constituting a defence to such new matter in the answer."[3] The section, as finally amended in 1852, is above quoted; the only important alteration being in restoring the general denial and in limiting the reply to such new matter as constitutes a *counterclaim*, that word being substituted for the term set-off.

[1] Original Code, § 131.

[2] Code of 1849, § § 153 and 155.

[3] Code of 1851, § 153.

The use of the reply in pleading, it will be observed, has been very much restricted by the late amendment. Heretofore it was necessary, not only to take issue upon every material fact alleged by way of defence in the answer, but also to set up specifically such new matter in the reply as the defendant intended to rely upon in avoidance of the answer. Thus, in Walrod *v.* Bennett,[1] the defendant answered that the plaintiffs who brought the suit jointly, were not the joint owners of the property. This averment was held new matter requiring a reply; and if not specifically controverted, was to be regarded as admitted on the trial. In that case, it was held that, not only was no evidence required to establish the fact, but evidence to contradict it was inadmissible. All this is changed under the present amendments. Such an answer, and indeed any answer setting up new matter not constituting a counterclaim, is deemed to be controverted precisely the same as though the plaintiff had put in a reply traversing the allegations. This, however, suggests a question of some importance. *Is a reply in any case necessary or allowable to new matter in the answer, not constituting a counterclaim?*

1. *Is it allowable?*—It seems to me, from the language of the Code, that the plaintiff is at liberty, if he thinks proper, to set up any material allegations by way of avoidance to any new matter in the answer, whether such new matter relate to a counterclaim or not. The language is, that he may allege "any new matter, not inconsistent with the complaint, constitut-

[1] 6 Barb. S. C. R. 144, at General Term, 5th District.

ing a defence to such new matter in the answer." It may be said, perhaps, with truth, that the term "such new matter" relates to the first clause of the section, namely, new matter constituting a counter-claim. Granting this to be so, still there does not appear to be anything in the Code to *prohibit* such a reply, and a variety of causes might be very readily mentioned in which it would be manifestly proper. Thus, for example, take the case provided for by statute[1] where a defendant pleads a discharge under the United States bankrupt law, in which case, under the old practice, the plaintiff might generally reply that such discharge was obtained by fraud, and give notice specifying the acts of fraud on which he relied to sustain his case.—Would not a reply, in such a case, be allowable? Even if not strictly within the letter of the Code, how could a defendant take advantage of it? The only way it could be reached, would be by motion, to strike out such matter as irrelevant or redundant matter; but this is done only on motion of a person "aggrieved;" and in such case, instead of being aggrieved, it appears on the face of the papers, that the defendant is actually benefitted by being thus apprised of the very point on which the plaintiff relies to avoid the effects of the discharge.

An answer of infancy is a similar case. The reply sets up that the goods furnished were necessaries, or sets up a new promise by the infant on arriving at full age; there seems no sufficient reason for striking out such a reply as irrelevant or redundant matter;

[1] Session Laws 1846, p. 305.

but in such a case, perhaps, the court might hold the plaintiff strictly to the matter set up, and not suffer him to avoid the defence in any other manner, particularly if it appeared that the defendant had been misled by it in preparing for the trial. Many other cases might be cited by way of illustration, but the above will be sufficient.

I conclude, therefore, that by the rules of pleading under the Code, the reply may contain, instead of a general denial of the allegations in the answer, whether relating to a counterclaim or not, an admission thereof, and any new and sufficient matter in avoidance not inconsistent with the complaint. This opinion is confirmed by the fact that the amended Code of 1852 retains section 155 as it stood before, providing that if the reply of the plaintiff to *any defence* set up by the answer of the defendant be insufficient, the defendant may demur thereto.

2. *Is such reply ever necessary?*—This is a more difficult question. For, if it be admitted that such a reply is proper and allowable, I am not prepared to say, but it might, in some cases, be actually necessary, in order, as in the case of bankruptcy above alluded to, to authorize the plaintiff to give the evidence on which he relies to invalidate or avoid the effects of the defence. The Code provides that the "allegation of new matter in the answer, not relating to a counterclaim, or of new matter in a reply, is to be deemed *controverted* by the adverse party as upon a direct denial *or avoidance*, as the case may require;"[1] that is, so far as the pleadings are to be received as

[1] Am. Code, § 168.

evidence in the action on the trial thereof. The allegations in the answer are to be deemed *controverted; i. e.*, the plaintiff denies them to be true, and throws upon the defendant the burden of the proof. Undoubtedly the plaintiff will then be allowed to offer evidence to disprove the defence, the same as may be done under any other issue. But under such a general traverse, may the plaintiff, in all cases, if the defence relied on be established, be permitted to prove a distinct matter *in avoidance* of the defence without setting it up and apprising the defendant of the nature thereof?

It is not quite clear what is meant by the expression "*controverted* as upon a direct denial, *or avoidance.*" The term *controverted*, as used elsewhere in the Code, it seems, means a mere denial or traverse;[1] the term *avoidance*, implies an admission of the fact, and the two appear to be in some degree incompatible. We can readily understand how an allegation may be deemed controverted as upon *a denial*, but not how it may be deemed *controverted as upon an avoidance.* Matter pleaded in avoidance of a cause of action or defence, does not in this sense *controvert;* that is, traverse, or deny, the cause of action or defence. If, therefore, the term *controverted* is to be regarded as the controlling word of the sentence, then section 168 may be construed merely as limiting the effect of the pleading as evidence in a cause,[2] and not as conferring on the plaintiff the right of rebutting a defence by evidence, going merely in avoidance, in the same manner as though such rebutting matter

[1] See § 149 Am. Code.

[2] See post, chap. viii., sec. 3.

had been specially set up by a reply. The language of the section is, at all events, fairly open to this criticism, and though, perhaps, the framers of the Code (or of the amendments) may have intended to admit any reply in evidence to such new matter without being pleaded, yet it is for the courts, in their discretion, to say whether it should be so construed or not.

A defendant sets up, by way of answer, the statute of limitations in an action on contract. No reply is put in. The defence is not to be taken as true, but is deemed *controverted* by the plaintiff—and the defendant must strictly prove it. Suppose the plaintiff rely on a new promise to take the case out of the statute. The new promise, it has been lately held[1] is the substantial ground of the action; may the plaintiff give it in evidence without setting it up in his reply? In other words, may he prove his real cause of action without stating it anywhere in his pleadings? He fully admits the fact alleged in the answer, that the cause of action did not accrue within six years next before the commencement of the action, and therefore, but for a new fact, which has given him a new cause of action, is fully discharged. This new fact it appears to us should be set up in the reply. Even though the construction be correct that the Code does not absolutely demand it in order to let in the evidence, yet the safer and more prudent course would be in all cases to plead this new fact, and apprise the opposite party of the real cause of action; for a judge might well hesitate to admit such

[1] 2 Coms. 523.

evidence (if duly objected to,) on the ground that the defendant was at least entitled to be apprised of the real cause of action in order to be prepared to meet it. The same would be true if the plaintiff relied on a new promise, in cases where infancy was pleaded, bankrupt discharged, &c. &c.[1]

From the best attention which could be given to this subject, however, I felt constrained to observe by a careful comparison of sections 153 & 168 that the intention of the legislature, so far as it can be inferred from language, appears to me to be, to do away entirely with the necessity of any reply, in any case, to new matter not constituting a counterclaim, and to permit the adverse party, on the trial, to controvert such new matter, or to avoid it by any competent testimony which he may have, and by the proof of any matters which would be a proper reply to such allegations. Yet in cases of doubt it will be always proper and prudent to set up in the reply matter which merely goes in avoidance of the defendant's defence, though such defence does not constitute a counterclaim; and such it is believed is the practice of the best practitioners.

If, instead of not replying at all, the plaintiff should put in a reply admitting such new matter to be true, there can be no doubt that the defendant would be relieved from the necessity of proving such defence, and that the cause might be brought on for hearing on the pleadings alone. If the new matter which

[1] And see case of Manning v. Whitbeck, cited ante, page 151, wherein it was said that the plaintiffs having neglected to set forth their whole case in the complaint, must bring forward the necessary allegations in the form of a reply.

the plaintiff wishes to set up, by way of reply in avoidance of the defendant's answer, is *inconsistent* with a denial thereof, he should accompany it with an *admission* of the fact in the answer which he wishes to avoid. Thus in case the answer alleges that more than six years have elapsed since the cause of action accrued, the plaintiff, if he relies on a new promise, should admit such allegations in the answer to be true, and set up the fact of the new promise in consideration of the pre-existing debt, in avoidance. If the consideration, that is the pre-existing debt, be not denied in the answer, the new promise will be the only point in issue between the parties, and this the plaintiff must prove in order to entitle him to recover.

Reply to Counterclaim.—If the defendant set up a counterclaim in his answer the plaintiff in his reply must either traverse, or confess and avoid it. We have already considered the nature of a counterclaim, and what matters may thus be pleaded.[1] It is in the nature of a cross-action, and, as has been seen, is to be stated substantially, according to the rules which govern the statement of an original cause of action. The reply of the defendant to such counterclaim is, in all respects, similar to the defendant's answer to a complaint. And first:

The Denial.—The plaintiff's reply must deny "generally or specifically each allegation controverted by him, or any knowledge thereof, sufficient to form a belief." In treating of the defendant's answer we have already considered this subject, and it will

[1] Ante, chap. v sec 4

be sufficient to refer to what was there said in respect to it, ante, pages 240 to 251.

If the plaintiff fails to reply the defendant may move for judgment, as for want of an answer; but not, it seems, if there is another issue of fact remaining undisposed of, that is, such an issue as, if found in favor of the plaintiff, would be decisive of the cause.[1] Where a plaintiff has already put in a reply to an answer, which contains also on the same paper a demurrer, and the defendant subsequently serves the same answer, without the demurrer, this is not an amended answer requiring a new reply.[2] So, too, in case a reply has been put in to an answer not verified, and the defendant subsequently serves the same answer verified, this is not an amended answer, and the plaintiff need not reply to the same under oath; the verification being no part of the pleading. But a supplemental answer requires a reply if it set up matter by way of counterclaim. And a plaintiff, it has been held, under the Code, may, in some cases, reply new matter in avoidance, which occurred after the answer had been served; as, where the answer alleged the pendency of another action for the same demand, the plaintiff discontinued such action after answer served, and replied that the suit was discontinued; the court held that the reply being true at the time it was put in, was a sufficient answer to the defence.[3] This doctrine, however, is questionable, and the rule, even if correctly applied in the case last cited, is by no means to be regarded as general,

[1] 1 C. R., N. S. 200. [2] 5 How. Pr. R. 207. 3 C. R. 215.
[3] Beales *v.* Cameron, 3 How. Pr. R. 414.

else a tender of amount of a claim, set up in defendant's answer by way of set-off, without costs, and after answer put in, might be replied in bar of the defence. The learned justice, in the above decision, referred to the case of White *v.* Smith,[1] under the old practice, to show that such was then the rule. In that case, however, a rule to discontinue the first suit had actually been entered (though the costs had not been paid) before the second suit was commenced, and the court held that the plaintiff might, after answer received, have paid the costs of the first suit and replied the discontinuance, because the payment would *have related back to the time the rule of discontinuance was entered*, which was prior to the commencement of the second suit. The case cited, therefore, does not sustain the decision. The correct rule, undoubtedly, is, that all matters arising after suit can only be available to the plaintiff, by supplemental complaint or reply, on leave of the court, pursuant to section 177 of the Code. Where, however, a plaintiff by mistake omits to make a reply, he may be allowed to do so in the discretion of the court, on such terms as may be just;[2] and that too even after the cause has been heard before a referee, where the complaint and answer do not bring up the whole merits of the cause.[3]

The denial in the plaintiff's reply, it will be seen, may be general or specific. If the answer is verified, the defendant has a right to have a reply in proper

[1] 4 Hill, 166.

[2] Am. Code, § 174.

[3] Merritt *v.* Slocum, 1 C. R., N. S. 68.

form from the plaintiff also verified. If the plaintiff, therefore, adopts the general form of denial, it will not be sufficient for him to say that he denies the defendant's answer in manner and form, &c.; that is, that he denies it as a whole. The denial should be the same as the general denial by defendant in his answer. He must deny "*each* allegation" set forth in the answer by way of counterclaim; so that, if one material allegation of such answer be true, the plaintiff cannot use this general form of denial, because he will not be able to verify its truth.

New matter in the reply.—Besides the general or specific denial of new matter in the answer constituting a counterclaim, the plaintiff, in his reply, may "*allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defence to such new matter in the answer.*" That is to say, he *must* allege it, if he expects it to form part of the subject matter in issue, or to be allowed to prove it on the trial. The reader is referred to what was said, ante, pages 241 to 248, relative to admitting defences under a general or specific denial, without setting them up as new matter; and it is scarcely necessary to repeat here that those remarks are entirely applicable to the reply. Thus, suppose the defendant, by way of counterclaim, should set up an off-set, as, for example, a matter of account, a promissory note, or any other demand arising on contract. This matter must be stated substantially the same as though embraced in a complaint in an original action; and the reply may traverse, or confess, and avoid it in the same

way; and the plaintiff, under a general or special denial, may give in evidence, anything going to show that no sufficient contract was made, within the limitations, and in the same manner as the defendant might do to the plaintiff's complaint.

What *must* and what *must not* be alleged as new matter in the reply to a counterclaim;—what *may* and what *need not* be alleged, have been sufficiently considered under their respective heads in the chapter treating of the answer, to which the reader is referred.[1]

So, too, in respect to irrelevant and redundant matter in the reply, and when, and in what cases, it will be struck out on motion; the rules are entirely similar to those which govern the answer. In giving proper effect to the word "aggrieved" in the section relative to this subject,[2] it is presumed that, in respect to the reply, as to matters in avoidance in the answer, which require no traverse, a more liberal rule will be adopted than in regard to the complaint. That is to say, as has been elsewhere observed in this section, should the reply set up matters material in proof to the issue, and which, if proved, will bar the defendant's defence, if these matters be well stated according to the rules of pleading of the Code, they should not be considered irrelevant or redundant, even though not strictly required to be set up by the Code. It will not, in such case, be sufficient for the party who moves to strike out such matters, merely to say that he may be aggrieved. He is not required

[1] Ante, chap. v., sec. 3.

[2] Am. Code, § 160.

to controvert them by any other pleading on his part, and he should, at least, be able to satisfy the court how, or in what manner, he may be aggrieved; if that fact is not apparent on the face of the papers, it should be made to appear by evidence *aliunde*.

The Reply must be consistent with complaint.—This rule, it will be perceived, is applicable to the reply alone, and can have no reference to the answer. Under the old system of pleading it was a settled rule that the replication must not depart from the declaration in any material matter, and the rule affected equally rejoinders and all subsequent pleadings.[1] A departure in pleading was said to be when a party quits or departs from the case or defence which he has first made and has recourse to another;[2] as in assumpsit by an executor on several promises which were all laid to have been made to the testator, to which the defendant pleaded the statute of limitations, and the plaintiff replied a subsequent promise to himself; the replication was held to be a departure, and therefore bad.[3] A departure in pleading, was matter of substance and to be taken advantage of by general demurrer.[4]

Under the code, as under the old practice, the plaintiff is not permitted to quit, or depart from the case made by him in his complaint. The reply may allege new matter "not *inconsistent* with the complaint." It is to be observed, however, that matter which maintains and fortifies the declaration was not a departure; nor would such matter be "inconsis-

[1] 1 Chit. Pl. 634.
[2] 2 Saund. 63.
[3] Id.
[4] 20 John. 163.

tent" under the code. Thus in trespass for an assault at H. if the defendant pleads *molliter manus imposuit*, to remove the plaintiff from his close at A., and the plaintiff reply that he had a right of way over that close, it is not a departure.[1] So in an action of debt on a judgment, the defendant pleaded an insolvent discharge, and the plaintiff replied that the judgment was rendered in another state in certain notes and *promises* in writing made prior to the discharge. This was held to be not inconsistent with the declaration, and no departure therefrom; but on the contrary, was matter merely explanatory of the declaration and tending to support and fortify it.[2] In a case not reported,[3] commenced under the Code, the action was upon a promissory note in the individual name of the president of a bank organized under the general banking law. The complaint did not show that the note was owned by the bank. The defendant's answer alleged that the plaintiff was not the real party in interest, but that the note was owned by the bank. The plaintiff replied that the bank was organized under the act of 1838, (which authorizes the president to sue in his own name), and that the plaintiff was the president of such bank. The defendant demurred to the reply, on the ground of its being a departure from, and inconsistent with, the complaint. The demurrer was overruled at the circuit, and judgment affirmed on appeal at General Term.

There have been but few adjudicated cases as to

[1] Chit. Pl. 637. [2] 1 Cow. 316.

[3] Beekman v. Cutler, January Term 1851, 3d district.

what matters in the reply are to be deemed *inconsistent* with the complaint under the Code. It may perhaps be laid down as a safe rule in framing the pleading, that whatever would have been a *departure* under the old system in matters of substance, and reached by a general demurrer, may be considered an inconsistent reply under the Code, and therefore defective. Thus in Brand *v.* Schenectady & Troy R. R. Co.,[1] a case under the Code where the complaint alleges injury to the plaintiff in consequence of being carelessly run against by the engine of defendant, and the answer denied the careless management of the engine, but charged that the injury was occasioned by the plaintiff's own carelessness; and the reply set up that the injury was occasioned by the bad condition of the track of the road, whereby the plaintiff was hindered and delayed in crossing it; this was said by the court to be a departure in pleading. But as no objection was taken before, or at the trial, the objection, it was held, was waived.

A more difficult question arises as to the proper mode of taking the objection to an inconsistent reply; whether by demurrer or by motion to strike out the reply as irrelevant.[2] In the case of Beekman *v.* Cutler, last cited, it was held at the circuit by the justice who overruled the demurrer,[3] that a demurrer would not lie to a reply which was sufficient in substance though it might be a departure from the complaint; the proper course was by motion to strike out as irrelevant. The general term, on affirming

[1] 8 Barb. S. C. R. 376.

[2] See post, chap. vii. § 3.

[3] Per WRIGHT, J.

this judgment delivered no opinion, though, it is presumed, the ground of the decision at the circuit was concurred in. Section 155 of the Amended Code authorizes a demurrer when the reply is "*insufficient.*" In Rae *v.* The Washington Mutual Insurance Co.,[1] JUSTICE GRIDLEY notices this point, without however deciding it. The question, it was said, might arise as to what defects will render a reply *insufficient.* Whether *insufficient* as an answer to the previous pleading in matters of substance; or *insufficient* as a complaint with the rules of pleading of the Code. The question was not adjudicated in that case, the decision being placed on other grounds. But in Fry *v.* Bennett,[2] the N. Y. Superior Court held that the term *insufficient* related not only to an absolute defect in pleading in matters of substance as a defence or reply to a previous pleading, but also to a violation of the rules of pleading prescribed by the Code, and that where a pleading violated these rules, it might be demurred to for insufficiency. This decision corresponding in some respects with the decision of the same court in Fabricotte *v.* Launity,[3] it is presumed may be safely adopted as a precedent. A reply which does not serve to maintain and fortify the complaint, but is a departure from, and inconsistent with it, is *insufficient* as an answer to the previous pleading within the rule laid down by the Code, and may, therefore, be reached by demurrer. I see no reason why such a reply may not also be struck out on motion as *irrelevant.* The motion is to

[1] 6 How. Pr. R. 4.
[2] 1 C. R., N. S. 239.
[3] 2 Sand. 743.

be decided on the same principles as a demurrer;[1] and if the matter is struck out the party aggrieved may appeal.[2] An *inconsistent* reply, is certainly *irrelevant* to the matter in controversy, even though it may contain matters which otherwise would avail the plaintiff in making out a cause of action. JUSTICE BARCULO, in Bedell *v.* Stickels lays down a rule which perhaps may be very safely adopted in practice in cases like these, namely, that if the matter set up in the pleadings is not clearly irrelevant it should not be struck out on motion, but the party should be left to his demurrer.

Reply may be part of answer.—The plaintiff may demur to one or more of several counterclaims set up in the answer, and reply to the residue. When it is said, however, that a plaintiff may demur to part of a defence and reply to the residue, it must be understood to mean only in those cases where two or more separate and distinct defences are set up in the answer. A demurrer will not lie to part of an *entire* defence; therefore a plaintiff cannot select from the answer certain matters not constituting an entire defence and demur to them, and at the same time reply to the residue.[3] The meaning of the Code is, that where the defendant sets up more than one entire and complete counterclaim in his defence, the plaintiff may reply to one or more of them, and demur to the residue. Where a demurrer and a reply were interposed to different parts of the same entire defence,

[1] Per HARRIS, J., 6 How. Pr. R. 70.

[2] Bedell v. Stickels, 4 How. Pr. R. 432

[3] Cobb *v.* Frazee, 4 How. Pr. R. 413.

the court on argument overruled the demurrer.[1] It was said in that case, that the more correct practice would have been for the defendant to move to strike out the demurrer. This would have been done, or, as in Slocum *v.* Wheeler,[2] the plaintiff compelled to elect by which he would abide.

Manner of stating new matter in the reply.—The reply to defendant's counterclaim being, as we have seen, entirely in the nature of an answer to an original complaint, the same rules govern the mode and manner of stating facts in a reply which are applicable to the answer. Under the practice in equity, the replication was a mere formal averment of the truth and sufficiency of the bill, and a denial of the allegations in the answer. Formerly the practice was, if the defendant offered new matter by way of defence in his answer, the complainant replied specially; but afterwards the use of a special replication was discontinued, and if the plaintiff desired to avoid the effect of the new matter, his proper course was to apply to amend the charging part of his bill.[3]

These rules, it will be observed, can have no application to the Code. A formal reply, merely for the purpose of producing an issue, is done away with entirely. There is no such thing now as a *charging* part to a complaint; that is, a part anticipating the defence, and setting forth the alleged pretences of the defendant. This defence must properly appear by the statements of the defendant himself. Matters which were in equity the subjects of a cross-bill by

[1] Id. [2] Id. 373.

[3] 1 Barb. Ch. Pr. 249, 250.

the defendant, requiring an answer from the plaintiff, are now to be set up by way of counterclaim in the same action, and are to be answered by the reply as prescribed in the Code. Both the general and special replication, as formerly used in Chancery, in respect to matter in avoidance alleged in the answer, are no longer necessary; unless, indeed, in the cases mentioned, ante, page 342, where the plaintiff may properly make a special reply or statement in the nature of a notice to the defendant, of those matters which he intends to rely upon in avoidance of the new matter in the answer. If such matters in the reply be clearly frivolous or palpably impertinent as a bar to the defendant's claim, they should be struck out, in analogy with the old practice of striking out frivolous matters in a notice.[1] If, however, they serve to fortify and sustain the complaint, or constitute the real ground of the plaintiff's cause of action, they should be permitted to remain on the record.

A replication, by way of a new assignment of the plaintiff's cause of action, in case of an evasive plea, can no longer be necessary. Such new assignment, under the old practice, was in the nature of a new declaration, or rather of a more precise and particular repetition of the declaration.[2] The same thing can be accomplished under section 172 of the Code, by amending the complaint, as, of course, within twenty days after service of the answer.

Where a complaint seeks to charge a silent partner as a general partner, it is not proper for the plaintiff

[1] 1 Hill, 663.

[2] Steph. Pl. 227. 1 Burr. Pr. 187.

to report the facts on which he relies as evidence to prove the defendant such general partner. If the defendant, in his answer, sets up the special partnership, the plaintiff may then reply the facts on which he relies to show that he was not a special, but a general partner.[1]

SECTION II.

VERIFICATION OF THE REPLY.

THE reply of the plaintiff to the defendant's answer must be verified in the manner prescribed by section 152 of the Amended Code, when the plaintiff, by verifying his complaint, has made it necessary for the defendant to put in an answer under oath. And even if the complaint be not sworn to, the defendant, if he choose, may verify his answer, in which case, if the plaintiff put in a reply, it must be verified.[2]

A party is privileged from verifying a reply in the same cases in which he is privileged from verifying an answer.

And, generally, the rules applicable to the verification of an answer are the same with those applica-

[1] Stone v. DePuga, 4 Sand. 681.

[2] Levi v. Jakeways, 4 How. Pr. R. 126.

ble to the verification of the reply, as to which vide chap. v., section 5.[1]

SECTION III.

FRIVOLOUS AND SUPPLEMENTAL REPLY.

If a reply be frivolous the opposite party may, upon a previous notice of five days, apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly.[2]

This provision of the Code remains unchanged by the amendments of 1852. It is, of course, to be taken in connection with those amendments, and its effect is, therefore, much restricted. Prior to these amendments every allegation of new matter in the answer was required to be traversed, or confessed and avoided by the reply; and a reply not generally or specially controverting a material allegation of new matter in the answer, but setting up some frivolous matter of avoidance thereto, might, under this section, be overruled on a summary application to a judge, either in or out of court, and judgment be rendered for the plaintiff, as for want of a reply.

By the amendments, however, as we have seen,

[1] See also Verification of the Complaint, chap. iv., sec. 4.

[2] Am. Code, § 247.

new matter in the answer, not constituting a counterclaim, is considered controverted for the purposes of the trial, and an issue is joined thereon which must be tried. However frivolous, then, a reply of new matter may be, the defendant cannot, under this section, move for judgment so long as any material issue of fact remains untried in the cause.[1] A frivolous reply within the meaning of this section, to authorize an application for judgment, must be one which *admits in terms* the allegations in the defendant's answer, and undertakes to avoid them by matters which, upon their face, are clearly and palpably frivolous. If any issue of fact remains to be tried, the frivolous reply, if clearly frivolous and irrelevant, may be struck out on motion; or if there is a doubt as to its sufficiency in law to constitute an answer to the defendant's defence, the objection may be taken by demurrer.[2]

Sham and irrelevant reply.—Section 152 authorizes "sham and irrelevant answers *and defences*" to be struck out on motion. Is this section confined in terms to the defendant's answer, or may it be also extended to the reply? A reply of new matter to the defendant's counterclaim is in the nature of an answer to such new matter. In other words it is a defence to what would have been a cause of action if pleaded in an original suit. A counterclaim is nothing more or less than a cause of action between the same parties, which the Code permits to be set up as a defence in the same action, and finally determined on the same trial. When the reply alleges

[1] Comstock *v.* Hallock, 1 C. R., N. S. 200.

[2] 4 How. Pr. R. 68. 4 Sand. 660. 6 How. Pr. R. 21.

new matter it is as a *defence* to such counterclaim. If such defence be sham or irrelevant it seems to come not only within the spirit and meaning, but within the language and letter of the Code. A *sham*, that is a false, and an *irrelevant*, that is a foreign and palpably insufficient reply, may be struck out on motion under section 152.

Judgment cannot be given for the defendant on striking out a sham and irrelevant reply, unless such reply also *in terms admits* matters set up in the answer which constitute a full defence to the action. Nor within the case of Darrow *v.* Miller[1] can judgment on account of the frivolousness of the reply be given, unless the notice of motion specifies that the party will apply for such judgment. If the application is merely to strike out a defence, (*i. e.*, an answer or reply), as sham or irrelevant, the motion is analogous, and the order will be similar to that of an application to strike out redundant and irrelevant matter under section 160. The sham or irrelevant reply will be struck out with costs, or on such terms as the court may impose, and the plaintiff be permitted, if a proper case is shown, to make a further reply, leaving the issues joined on the answer of the defendant to be tried.

As to the nature of a sham, irrelevant, and frivolous defence, the distinction existing between such defences, and the mode of taking an objection to them, respectively, see ante, chap. v., section 6.

Supplemental reply.—The plaintiff, under section 177 of the Amended Code, may be allowed on motion

[1] 5 How. Pr. R. 247.

to make a supplemental reply alleging facts material to the case occurring after his former reply, or of which he was ignorant when his reply was made. This supplemental reply of new matter is also entirely analogous to a supplemental answer by the defendant to the plaintiff's complaint, and is governed by the same rules.[1] A defendant was not allowed to make a supplemental answer contradicting the statements in his first answer, nor to alter essentially and new model the matter of his original answer.[2] This rule is, no doubt, equally applicable to a supplemental reply. It may be added that such supplemental reply, like the original reply, must not be inconsistent with the complaint, but must consist of matter tending to strengthen or fortify the complaint, or comprising a new and separate defence to the defendant's counterclaim, and one which is consistent with the defence already set up. Whether an equitable defence to the defendant's counterclaim, accruing after action brought can be pleaded, see ante, page 345.

The facts proper to be stated in the supplemental reply, must be such as have occurred after the former reply was put in, or of which the plaintiff was at that time ignorant.

In Bralo *v.* Cameron, cited supra,[3] the answer alleged the pendency of another suit for the same demand, whereupon the plaintiff discontinued the former suit, and replied the discontinuance. It may be doubted whether this practice is now correct. If the discontinuance does not relate back to a time be-

[1] See ante, chap. v., sec. vii.

[2] 1 Barb. Ch. Pr. 167.

[3] 3 How. Pr. R. 414.

fore the suit was commenced,[1] the safer way would seem to be to set up such a matter by way of supplemental reply on leave of the court first obtained, and on such terms as to the payment of costs as may be prescribed.

[1] 4 Hill, 166.

CHAPTER VII.

OF THE DEMURRER.

THE Code has retained the *demurrer* to the different pleadings on the part of both plaintiff and defendant, though its use has been much limited, it being now confined entirely to matters of substance, and not of form, in the cases prescribed by the Code.

A demurrer at law is defined to be a pleading which imports that the objecting party will not proceed with the pleading because no sufficient statement has been made on the other side; but will wait the judgment of the court whether he is bound to answer.[1] It might be for insufficiency, either in *substance* or in *form;* either on the ground that the case shown by the opposite party was *essentially insufficient* to maintain the action or defence, or on the ground that it was stated in an *inartificial manner*. In the former case, the demurrer might be *general*, and might except to the sufficiency of the pleading in general terms, without showing specifically the nature of the objection. In the latter case, it was required to be special, and to point out the particular ground of the exception.[2]

[1] Steph. Pl. 43. [2] Id. 140.

The use of the demurrer to the bill of complaint in equity was entirely similar. Whenever any ground of defence was apparent upon the bill itself, either from the matter contained in it, or from defect in its frame, or in the case made by it, a demurrer was proper.[1] It was an allegation, which, admitting the matters of fact stated in the bill to be true, insisted that they were insufficient for the complainant to proceed upon, or to oblige the defendant to answer; or that, for some reasons apparent on the face of the bill, or because of the omission of some matter which ought to be contained in it, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer.[2]

A demurrer as applied to the present practice is defined in general terms, and the cases in which it may be used specified, by the Code. It is the object of the present chapter to consider the nature of the demurrer, how and when it may be pleaded, and generally the changes in respect to it which have been effected by the Code. The subject will be considered in the following order:

1. Nature and use of the demurrer.
2. What matter in a complaint may be demurred to.
3. What matter in an answer or reply.
4. Grounds of demurrer, how to be stated.
5. Objection, when it may be reached by answer, when taken on motion, or by demurrer, and when deemed to be waived.
6. Frivolous demurrer and practice thereon.

[1] Mitf. Eq. Pl. 107.

[2] Mitf. Eq. Pl. 107, 1 Barb. Ch. Pr. 106.

SECTION I.

NATURE AND USE OF THE DEMURRER.

A DEMURRER, both under the practice at law and in equity, admitted the facts pleaded for the purpose of the argument, and merely referred the question of their legal sufficiency to the decision of the court.[1] This rule is not changed by any provision of the Code.[2] A demurrer which does not admit the facts is insufficient, and will be disregarded for all purposes.[3]

Under the old practice there was a great variety of causes for which a demurrer would lie, not only matters of substance, but the merest matters of expression and form. Thus, if a plaintiff omitted to allege a day, or a place, in his declaration, it was demurrable; so if in an action of trespass he omitted the formal words "against the peace," and "by force and arms," the defendant might demur. The Code makes no provision for a demurrer in any of these cases, or, indeed, in any case whatever where, under the old system, the matter objected to would have been defective in form, or by reason of an inartificial manner of statement. An omission to allege a day or a place, for example, cannot be demurred to;

[1] 1 Chit. Pl. 661.

[2] Hall *v.* Bartlett, 9 Barb. S. C. R. 297.

[3] Clark *v.* Van Duzen, 3 C. R. 219.

but if, for the want of any such allegation, the pleading is not reasonably definite or certain, the party aggrieved may obtain a remedy on motion under the latter clause of section 160.[1]

A demurrer at law, when for matters of substance, might be *general*, though if there were any doubts as to whether the defect was one of substance or merely of form, a special demurrer was the better course, inasmuch as it raised at once the questions as to the particular defects pointed out, and generally as to the sufficiency of the declaration. A demurrer to a bill in equity was generally required to express the grounds upon which it was founded.[2] This is the practice retained by the Code, as to which see post. section iv. of this chapter.

A defendant was not limited to one cause of demurrer only, either to a pleading at law or a bill in equity. He might assign as many causes of demurrer as he pleased, and if any one of the causes assigned was held good, the demurrer would be allowed.[3] This rule is also unchanged; a defendant may demur for any one or more of the causes specified by the Code.

In equity, a demurrer might be to the whole bill, or to a part only of the bill. The defendant might demur to a part, plead to another part, and answer as to the residue; though such defences were each required to be to different and distinct parts of the bill,

[1] Am. Code.

[2] It might be general or special, Story Eq. Pl. § 455.

[3] Story Eq. Pl. § 443.

and to be consisten twith each other.[1] At law a demurrer was allowed to one of several different counts in the declaration and an answer to the residue. This rule is preserved by the Code;[2] but the demurrer in such case must be to an entire cause of action[3] or defence.[4]

In Manchester and others *v.* Storrs[5] and others, Mr. JUSTICE GRIDLEY, held at Special Term, that not only was a demurrer unauthorized by the Code to part of the allegations in the complaint, all of which, connected together, form a statement constituting one entire cause of action, but that a defendant could not even demur to one of two or more distinct causes of action set up in the complaint, and answer the residue. "We must forget," he says, "all old rules respecting demurrers, and regard a demurrer now as a pleading *created*, with its *character* and *office defined* by the Code." He held, in that case, that while at *law* a demurrer was allowed to one of several different counts, and while in *equity* you might demur to a part and answer the residue of the bill, that the Code forbid a demurrer, except to the entire complaint.

This decision was made before the amendment of 1849 to the Code, specified in section 149. A demurrer may now be taken "to the whole complaint, or to any of the alleged causes of action stated therein." This language, however, does not, it is conceived, change the rule laid down in the case last cited, that the demurrer must be to an *entire* cause of action or defence, and cannot be to part of the

[1] Story Eq. Pl. § 442.
[2] 3 How. Pr. R. 410.
[3] 3 How. Pr. R. 410.
[4] Am. Code, § 123 and 151.
[5] 4 Id. 413, 1 C. R., N. S. 184.

allegations which constitute such cause of action or defence. This construction is apparent from section 151 as amended, and has also been so repeatedly adjudicated.[1] But, under the Code, it has been held, that a demurrer must not be too broad; as where a complaint has a double aspect, one being an ordinary creditor's bill, and the other to set aside an assignment made by defendant, a demurrer to the whole complaint that it does not show the return of an execution unsatisfied, is bad, and will be overruled, because such an objection could not be taken to the complaint in its second aspect.[2]

It was a rule in pleading that on a demurrer the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it. Thus, when the plaintiff demurred to defendant's plea, if his declaration was bad, judgment would be rendered for the defendant. So, if the demurrer was to the reply, and there was a substantial fault in the plea, judgment would be rendered for the plaintiff; though if the declaration was also bad *in substance*, the defendant was entitled to judgment. If the declaration, however, contained two counts, one of which was bad and the other good, the good count would support the declaration; and the plaintiff, on demurrer to a defective plea, would be entitled to judgment.[3] But in looking back of the pleading demurred to, the court would not regard matters of

[1] 4 How. Pr. R. 413. 5 Id. 5. 2 Sand. 704. 1 C. R., N. S. 325.

[2] Cooper *v.* Clason, N. Y. Special Term, per EDMONDS, J., 1 C. R., N. S. 347.

[3] 8 Wend. 129 10 Peters, 257.

form. Thus, on a demurrer to a plea defective in substance, the court would not render judgment against the plaintiff for the reason that his declaration was technically insufficient, and might have been specially demurred to.

JUSTICE SANDFORD, in the case of Schwab *v.* Furniss, in the N. Y. Superior Court,[1] remarks in regard to the question whether on a demurrer either party may go back and attack a previous pleading: "I have come to the conclusion that the practice in this respect remains as it existed in actions at common law prior to the Code, and that the antecedent pleading may be attacked. For example: on a demurrer to an answer, the defendant may attack the complaint for defects in matters of substance, but not on objections which go only to the form of the pleading. The defect must be such as could be reached by a general demurrer."

In this case, as elsewhere reported,[2] and decided with the concurrence of all the Judges of the Superior Court, it is further observed: "There is no more reason now than formerly that a plaintiff should have judgment on demurring to an answer when it appears upon the face of the record that he has no cause of action; or that the defendant should succeed on a demurrer to the reply, when it is apparent upon his answer that he has no defence." A similar doctrine was held in the same court at General Term, in the case of Fry *v.* Bennett;[3] namely, that on the argument of a demurrer to an answer, the defendant may

[1] 1 C. R., N. S. 342.

[2] 4 Sand. 704. [3] 1 C. R., N. S. 256.

attack the complaint, but the grounds of the attack, to render it successful, must be such as would have entitled the defendant to judgment had he elected to demur instead of answering. It is said also that, on such a demurrer, the complaint may be attacked only when it appears on its face that the plaintiff has no cause of action, or that the court has no jurisdiction; defect of parties, misjoinder of actions, &c., are not such objections as can be reached in this manner.[1] The point, however, was not judicially determined in either of the above cited cases.

Under the former practice there could not be a demurrer and a plea to the same part of the declaration.[2] And if a plea contained several distinct matters, divisible in their nature, as separate and distinct demands, the plaintiff could not demur generally to the whole because a part was bad; he should demur as to each of the separate defences badly pleaded, and answer the residue.[3] And when it is said that in equity a defendant may demur, plead, and answer to the same bill, it is not meant that he may demur and answer at the same time, to the whole, or to the same part of a bill,[4] but he might demur to one part and answer the residue. If the demurrer was not to the whole bill it must clearly express the particular part it was intended to cover, and if any part of the matter covered by it was also covered by a plea, or answer, the whole demurrer would be overruled.

[1] See note to above case of Schwab *v.* Furniss, 1 C. R., N. S. 342.

[2] 5 Wend. 104.

[3] 11 John. 16.

[4] 6 John. Ch. R. 214.

These rules that a demurrer and an answer cannot be both sustained at the same time to the same cause of action or defence, are now well settled to be applicable to an action under the Code. Although it was intimated in one or two cases[1] that a defendant might demur and answer to the same cause of action, yet, the subsequent cases of Slocum *v.* Wheeler,[2] and Spelman *v.* Weider,[3] it is generally understood, have settled the rule to the contrary.

Where two defendants, having separate interests, sever in their defences, one may answer and another demur to the same cause of action. Each defendant in such case may raise a separate issue on the plaintiff's complaint, and is entitled to interpose any defence he may think proper. An answer of one of several defendants separately liable will not inure as an answer of the others.[4] Where a complaint sets forth several distinct acts done by the defendants, and claims that by each of such acts the defendants became liable to pay the plaintiff, &c., this, it seems, may be regarded as a complaint containing several causes of action, and separate demurrers may be interposed to each, or the defendant may, it seems, demur to one and answer the residue.[5]

The nature of a demurrer, therefore, under the Code, is not essentially different from what it was under the old practice. Its uses are similar, with the exception that it is now applied only to raise objec-

[1] Falconer *v.* Meyer, 2 Code R. 49. Gilbert *v.* Davies, id. 50.
[2] 4 How. Pr. R. 373. [3] 5 Id. 5.
[4] 1 C. R., N. S. 343.
[5] Ogdensburgh Bank *v.* Paige, 2 Code R. 75. 11 John. 16.

tions to matters of substance, and can be used only in the cases prescribed in the Code.[1] These cases I shall consider in the subsequent sections of this chapter. A demurrer cannot be used under the new system, any more than it could under the old, as an exception to matters of impertinency and irrelevancy. Such matters, if objected to, must be struck from the pleading on motion, and cannot be demurred to; unless, indeed, the entire cause of action or ground of defence be irrelevant, or insufficient, in which case, as in a pleading at law, a demurrer will be proper to test the sufficiency of the pleading. And see further, post, section v. of this chapter, as to the cases in which it will be proper to take the objection by motion to strike out irrelevant matter, and for judgment on an irrelevant answer; and where the proper course will be to raise the objection on demurrer.

SECTION II.

WHAT MATTERS IN THE COMPLAINT MAY BE DEMURRED TO.

THE Code defines six general causes for which an objection may be taken to the complaint by demurrer. They are as follows:

[1] Boyce *v.* Brown, 3 How. Pr. R. 395. 7 Barb. S. C. R. 412. 3 How. Pr. R. 410.

The defendant may demur to the complaint, when it shall appear upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action: or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties, for the same cause; or,

4. That there is a defect of parties, plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action.[1]

It is to be observed in the first place, that, in order to enable the defendant to avail himself of the objection by demurrer, the defect must appear "upon the face" of the complaint. It must be such that, admitting for the purposes of the argument, all the facts to be true, yet the complaint is insufficient to enable the plaintiff to recover for one of the above causes as specified in the Code. And first:

1st. *Want of jurisdiction.*—At common law, an objection to the jurisdiction was commonly taken by plea in abatement. It might however be shown under the general issue, as that there was no court in the county which has jurisdiction of the case.[2] And, generally, in courts of inferior jurisdiction, the want of jurisdiction was fatal to the suit at any stage of the proceeding without any plea or objection.[3] The

[1] Am. Code, § 144.

[2] 5 Mass. R. 124, 3 John. 113.

[3] 1 Chit. Pl. 442, 2 Cow. Treat. 668.

defendant, however, might plead to the jurisdiction if he thought proper, and this was esteemed the better course.

In equity, if the want of jurisdiction was apparent on the face of the bill, the proper course for the defendant was to demur to the relief. These causes of demurrer were various; many of them were peculiar to the practice in equity, and, since the union of law and equity in our courts, have no farther application to our system. Thus a demurrer would lie to a bill for want of equity to sustain the jurisdiction, when there was no sufficient ground shown in the bill for the interference of a Court of equity. And whenever it appeared that the plaintiff had an adequate remedy at law, a demurrer would lie to the relief, as if an action should be brought for the recovery of the possession of land, or for the payment of a lost note, or to decide upon the validity of a will of real estate; the proper tribunal in all these cases being a court of law, and equity having no jurisdiction.[1]

So too the complaint was required, not only to state a case properly within the cognizance of a court of equity, but the amount claimed, or the value of the property in controversy, must be not less than one hundred dollars exclusive of costs in order to give the court jurisdiction;[2] and in all cases the bill was required to show affirmatively that the case was within the appropriate jurisdiction of a court of equity, nor was the defect cured by any waiver, or even by the consent of the parties, so as to confer a jurisdiction

[1] Story, Eq. Pl. §§ 474 to 478.

[2] 2 R. S. 173, § 40.

not vested by law.[1] These principles, it will be perceived, applied exclusively to the Court of Chancery, and since the abrogation of that court, and the establishment of a uniform method of proceeding in civil actions, they are no longer applicable in practice. Where, too, upon the face of the bill there was no remedy, either at law or in equity, a demurrer to the relief was also proper; as if a bill sought to recover back money which had been voluntarily paid by a party upon a suit being threatened, or brought, and his defence to the suit was that there was fraud in the transaction on which the suit was brought, or to be brought, the bill would be demurrable, notwithstanding he should state in his bill that at the time when he made the payment it was under a protest that he would seek redress in equity, for in such case it does not appear but that the defence might have been effectually sustained at law, and if so it would have been his duty to make it in the suit at law.[2] In this class of cases, where the complaint shows that the plaintiff has no remedy at all, a demurrer will be proper under the Code.

As to the subject matter.—A demurrer under the Code to the jurisdiction of the *subject matter* of the action will lie in those cases in which such subject matter is not properly cognizable by any court of justice: As where the subject matter is entirely of a political nature and therefore constitutes a fit subject for negotiation or treaty by the executive department of the government.[3] Cases arising under foreign treaties which involve controversies or

[1] 1 Barb. Ch. Pr. 39.
[2] Story, Eq. Pl. § 468.
[3] Story, Eq. Pl. § 483.

considerations purely of a political or, sovereign character, or purely executory by the governments themselves, would be held to be, from their very nature and character, incapable of being enforced in any of the courts of the United States.[1]

A state court has no power to annul the judgment or determine the extent of the jurisdiction of the federal courts.[2] Nor can a state court enjoin a judgment of a circuit court of the United States or stay proceedings under it.[3] Nor can it entertain jurisdiction over acts done by an officer of the United States in his official capacity.[4] Nor in a suit instituted to restrain the infringement of a patent right; and consent cannot confer such jurisdiction.[5]

In general the fact that *the property* is not within the jurisdiction constitutes no bar to a proceeding for equitable relief, if the person is within the jurisdiction. But questions, it is said, may arise under a bill respecting funds, or other things in a foreign country so purely local that a court of equity in another country might very properly decline to interfere, and remit it to the domestic forum.[6]

The Supreme Court has original jurisdiction of all actions real and personal arising within the state, and of all transitory actions wherever the cause of action may have arisen.[7] It has been held in one case that the statute making actions of trespass for

[1] Story Eq. Pl. § 469.
[2] 7 Cranch, 271.
[3] 3 Coms. 9. 7 John. 144.
[4] 5 Cranch, 115.
[5] 6 Wheaton, 598.
[6] 6 Cranch, 158. 2 Paige, 402. Story Eq. Pl. § 489.
[7] Grah. on Jurisdiction.

injuries to the person local, has no reference to actions brought for such trespasses commited out of the state, and has not taken away the jurisdiction of our courts to entertain them.[1] But trespassses, or injuries, to lands committed in another state are not within the jurisdiction of our state courts.[2] Personal wrongs committed by an officer of the navy while at sea, and engaged in the public service, are within the jurisdiction of the state courts.[3] And so in cases of marine torts, as for a collision on the high seas, courts of common law have concurrent jurisdiction with Courts of admiralty,[4] and the Superior and Supreme courts have concurrent jurisdiction with the courts of the United States in questions of salvage, and are competent to afford a remedy.[5] And our state courts have also jurisdiction between a state and citizens of another state.[6]

Courts of limited jurisdiction are those which are circumscribed in the exercise of their powers within certain local bounds, such as a town, city, or county; or are confined to the cognizance of certain descriptions of actions, being regulated either by the amount claimed, the character of the parties, the nature of the cause of action, or the locality in which it arose.[7] So far as inferior courts of limited jurisdiction are concerned, the proceedings should show affirmatively that the court has jurisdiction.[8] The jurisdiction is never presumed, until the contrary appears, as is the

[1] 17 Wend. 323.
[2] 7 Hill, 95.
[3] 2 Sand. 379. 5 Barb. S. C. R. 209.
[4] 26 Wend. 192. 2 Hill, 159.
[5] 4 John. 292.
[6] 6 Hill. 82.
[7] 18 John. 257.
[8] 1 Burr. Pr. 36.

case in a superior court.[1] If such jurisdiction be not shown in the pleadings it will be a ground for demurrer under the Code; and even if the objection is not thus taken, a judgment for the plaintiff will still be invalid and void.[2] In a superior court, however, jurisdiction will be presumed, and a demurrer will not lie for the reason that jurisdiction is not affirmatively shown. If the want of jurisdiction does not appear, the objection, if any such exist, may be raised by answer,[3] or if not thus raised the judgment will be set aside at any subsequent stage, whenever such want of jurisdiction shall appear.[4]

1. *As to the person of the defendant.*[5]—If a want of jurisdiction appear also in this respect, the defendant may demur. We have briefly noticed above some of the cases in which our State Courts have, and have not, jurisdiction of the subject matter of an action; and have seen generally that they have jurisdiction in all cases, whether legal or equitable, where the person of the defendant is within the jurisdiction of the court, no matter where the cause of action arose, except in that class of cases at law heretofore denominated local, as trespass to land, ejectment, &c., &c.,[6] in

[1] 1 Hill, 130.

[2] 2 Id. [3] Am. Code, § 147.

[4] Am. Code, § 144. 1 Hill, 130.

[5] As to privilege from arrest of the person, and in what cases the court does not acquire jurisdiction, see Grah. Pr. 123 to 144. And see as to privilege of foreign consul, ambassador, &c., to be exempted from jurisdiction of State tribunal, 6 Wend. 333; 10 id. 50; 7 Peters U. S. R. 276; 8 id. 324; 5 Barb. S. C. R. 115.

[6] And so also for partition and other actions and claims relative to real estate and the title thereof.

which case the subject matter of the relief claimed, or of the injury complained of, must be within the territorial jurisdiction of the court.

There is also a certain class of cases in which the court exercises jurisdiction over the rights of parties who are not within the jurisdiction of the court, and personally amenable to process, but who are either necessary or proper parties defendants to an action. Thus where a defendant is a proper party to an action relating to real property in this state, or the subject of the action is real or personal property in this state, and the defendant has or claims a lien or any interest therein, or the relief demanded consists in excluding the defendant from any interest or lien therein; or where the defendant, though a non-resident of the state, has property therein, and the cause of action arises on contract; or the defendant is a foreign corporation, and has property in this state, or the cause of action arose therein, in these various cases the court will exercise jurisdiction over the absentee or non-resident defendant, in respect to such property or cause of action; and the Code particularly prescribes the manner of the service of process upon such defendants.[1] This is similar to the former manner of serving process upon absent defendants in suits in equity, and the rule is now made uniform and extended to all cases. At common law, before a judgment could be pronounced against the person, the defendant must be in court, either upon its process or by voluntary submission to its jurisdiction. If not so in court, he might plead to the jurisdiction of the

[1] Am. Code, § 135.

person, if he had notice of the suit and chose to appear. Service of process out of the territorial jurisdiction of the court was at common law a nullity, and mere personal service of process on a defendant out of the state is void as the basis of any judicial proceeding, and confers no jurisdiction over the defendant.[1] Even the personal service of a summons upon the president of a foreign corporation, who happens to be temporarily in this state, and does not voluntarily appear, it has been held, gives no jurisdiction of the defendant (the corporation) for the purpose of rendering a personal judgment upon contracts made in this state, or for debts due to residents of this state. So held by JUSTICE SILL, at Special Term, in Hulbert *v.* The Hope Mutual Insurance Company;[2] and affirmed at General Term on appeal.[3] The only method of acquiring jurisdiction in such cases, is that prescribed by the Code, by order of publication, &c., pursuant to section 135. Thus in the case last cited, if the defendant (a foreign corporation) had property in this state, or if the cause of action had arisen therein, the plaintiff might have obtained an order of publication, and having published it for the requisite length of time, and served copy, summons, and complaint by mail, (or made personal service out of the state in lieu of publication and deposit in post-office), the court would have acquired jurisdiction to render the judgment.

The court will also exercise jurisdiction over an absentee defendant, in an action for divorce, in the

[1] Litchfield *v.* Boswell, 5 How. Pr. R. 346.

[2] 4 How. Pr. R. 275. [3] Id. 415

same manner, and in the cases prescribed by law.[1] The cases in which the court has jurisdiction by statute, to grant a divorce for adultery, are, 1st. Where both husband and wife were inhabitants of this state at the time of the commission of the offence. 2d. Where the marriage was solemnized or took place within this state, and the injured party, at the time of the commission of the offence, and at the time of exhibiting the bill of complaint, is an actual inhabitant of this state. 3d. Where the offence was committed in this state, and the injured party, at the time of exhibiting the bill of complaint, is an actual inhabitant of this state.[2]

Under the former practice in Chancery, which required the bill to show jurisdiction, it was necessary for the complainant to state facts in the bill sufficient to bring the case within one of the above heads.[3] This does not seem to be necessary under the uniform rule of pleadings adopted by the Code. Unless an absolute want of jurisdiction appears on the face of the complaint a demurrer will not lie, jurisdiction being presumed in a superior court till the contrary appears.[4]

So, too, by the former rule in the Chancery practice,[5] the bill must positively aver that the adultery was committed without connivance, that more than five years have elapsed since discovery, and plaintiff has not voluntarily cohabited, since discovery, with defendant; or if defendant is living in open adul-

[1] Am. Code, § 135, 5th Subdivision.
[2] 2 R. S. 144, § 35.
[3] 9 Paige, 550.
[4] 1 Hill, 130, ante, page 377.
[5] Rule 163.

tery with another person, that five years have not elapsed since the commencement of such adulterous intercourse.[1] None of these matters, under the new rules of the Supreme Court, need now be alleged in the complaint, but the plaintiff may, (and unless stated in the complaint, and verified as prescribed by the Code) *must* supply the omission by his affidavit, in order to show himself entitled to judgment, pursuant to the statute.[2]

2. *That plaintiff has not legal capacity to sue.*— This is the second ground of demurrer to the complaint specified in the Code. Objections to the person of the plaintiff that he has not legal capacity to sue as: 1st That the plaintiff is not entitled to sue, by reason of some personal disability, or; 2d. That the plaintiff has no title to the character in which he sues, were also at common law usually raised by plea in abatement. In equity they were the proper subject of a demurrer if apparent on the face of the complaint, and so also by the Code.

Thus under the first class, if it appear by the complaint that the plaintiff is an infant, or married woman,[3] or idiot, or lunatic, and is thus incapable of instituting a suit alone, and no next friend or committee is named in the complaint, the defendant, in analogy with the former equity practice, may demur.[4] If it does not appear on the complaint, the objection (formerly taken by

[1] 2 R. S. 147, § 55.

[2] See Rules Sup. Court.

[3] Except in case she may by the Code sue *alone*. Ante, pages 80, 81.

[4] Story Eq. Pl. § 494.

plea) may be raised by answer. If not so taken the objection, in all subsequent proceedings, is held to be waived.[1] And so in cases where a trustee to whom the demand has passed, or the assignee of a chose in action, is required to sue in his own name for the collection of such demand. If that fact should appear on the face of the complaint, and the action be in the name of the assignor, insolvent debtor, or other person not having legal capacity to enforce the collection of the demand, the defendant may demur.

And so too under the second above class, namely, that the plaintiff has no title to the character in which he sues, the defendant may demur. As if, for example, it appear upon the face of the complaint, that the plaintiff sues as administrator under void letters of administration; or in virtue of a grant of administration in a foreign country, the objection may be taken by demurrer, for the reason that the plaintiff has no right, or legal capacity, under such letters to sue in our courts.[2]

3. *Another action pending between the same parties for the same cause.*—This also is a ground for demurrer by the Code, if the defect appears upon the face of the complaint; otherwise, objection must be taken by answer, or will be deemed to be waived. The objection can be taken in no other way. Accordingly, in an action for partition, a motion by plaintiff to set aside the proceedings in an action for partition commenced by the defendant, on the ground that an action for the partition of the same premises had been previously commenced by the plaintiff, was denied;

[1] Am. Code, § 148.

[2] Mitf. Eq. Pl. 155; Cooper, Eq. Pl. 169, 170.

it being held that the plaintiff's remedy was to set forth, in answer to the suit last commenced, the fact of the pendency of the first suit.[1]

This ground of objection will not ordinarily appear upon the face of the complaint; and the defendant will, therefore, usually be obliged to set it up in his answer. And though the second action, thus pleaded, must in general be between the same parties and for the same cause of action, yet, it is said, that there are exceptions to the rule, as where separate actions for the same single act of trespass are brought against several defendants, the one last served may avail himself of the pendency of the action against the first; and so a recovery against one of several parties to a joint tort, frequently precludes the plaintiff from proceeding against any other party not included in the action.[2]

In an action on a promissory note, a demurrer, or answer, of the pendency of a suit for the same cause of action in another state is bad.[3]

4. *That there is a defect of parties, plaintiff or defendant.*—This is the fourth ground of demurrer to the plaintiff's complaint provided by the Code. The objection, in this case, must be taken by demurrer, if it appear on the face of the complaint, otherwise by answer; and if not taken either way, it will be deemed waived, and the defendant will not afterwards be permitted to raise it.

We have already considered at length the question of the misjoinder and nonjoinder of parties in an

[1] Hornfager *v.* Hornfager, 6 How. Pr. R. 279, per PARKER, J.

[2] See Monell's Pr. 137 and 138, and cases cited.

[3] Burrows *v.* Miller, 5 How. Pr. R. 51, per EDMONDS, J.

action under the Code, and who are proper and necessary parties to complaints.—See ante, chap. ii. sec. 2 and 3. It will not be necessary, therefore, to review this branch of the subject here. It may be said generally that the want of *necessary* parties, that is, such as must join, or be joined, plaintiffs or defendants, is always to be taken advantage of by demurrer or answer. The same rule is applicable to the *misjoinder* of parties, as if a person having no interest in the subject of the action is united as plaintiff, or a person against whom no decree can be made, is joined as defendant. If the misjoinder is of parties as plaintiffs, according to the equity rule, all the defendants may demur. But if the misjoinder is of parties as defendants, those only, according to the same rule, can demur who are improperly joined.[1] But query, inasmuch as every defendant has an interest in not having any persons made co-defendants who are not necessary or proper parties,[2] may he not properly interpose a demurrer to correct such a defect, whether he is the person improperly joined or not?[3]

If a demurrer is put in for want of necessary parties it should point out who are the proper parties to the action;[4] that is if from the matter in the complaint it appears who should be joined. This is in analogy with one or two decision under the Code in respect to what matters must be alleged in the answer in such cases.[5] It is also in analogy to the practice at law

[1] Story, Eq. Pl. § 544.
[2] Ante, pages 105, 106.
[3] See 1 Barb. Ch. R. 157.
[4] Story Eq. Pl. § 543 and see post, section 4 of this chapter.
[5] 4 How. Pr. R. 202, Id. 348.

where a plea in abatement was proper for defect in parties. The plea was required to give the plaintiff a better writ, and to point out who the parties were who ought to be joined. But if from the complaint it does not appear who are the proper parties the rule cannot apply. Thus a declaration commencing A, B and Co., is bad on demurrer, for it appears that there are some other persons who ought to be joined as plaintiffs;[1] but the demurrer is not required to specify who those persons are.

In equity, as we have seen, if the parties not brought before the court are necessary and proper parties, the exception, if not taken in the answer or by demurrer, might be raised at the hearing. And it seems a similar practice is recognized by the Code; for although by section 148, if the objection is not taken by answer or demurrer, "*the defendant shall be deemed to have waived the same;*" yet by section 122, (which it is said is the controling section in determining whether a demurrer for defect of parties is well taken[2]) when a complete determination of the controversy cannot be had without the presence of other parties, *the court must cause them to be brought in.* If these sections are taken together, they may, perhaps, be construed to mean, that the defendant at the hearing is stopped from setting up a defect of even necessary parties to defeat the plaintiff's claim for relief, but if such objection is raised the plaintiff will be at liberty to amend his bill by adding parties,

[1] 3 Caines, 170.

[2] 5 How. Pr. R. 99.

the cause in the meantime standing over for that purpose.

Where the parties who are omitted are mere formal parties, the objection, if intended to be taken at all, should be by demurrer or answer; for at the hearing, the court, if it can properly do so, will dispose of the cause upon its merits, without requiring such formal parties to be joined.[1] And such is the rule indicated by the Code.[2]

The Code provides that when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.[3] In such cases, therefore, a demurrer for defect of parties will be improper.

The rule is illustrated in a variety of cases, under the old practice in equity. Thus, where the parties aggrieved were a tribe of Indians, one could file a bill in his own name in behalf of all.[4] One creditor, as legatee, might sue in behalf of himself and all others standing in the same situation, and the others might come in under the decree.[5] So, where parties form a voluntary association for private or public purposes, and those who sue or defend are fairly presumed to represent the rights and interests of the whole, the court would allow a bill to be brought by some of the parties on behalf of themselves and all others; though, if brought by the plaintiff alone, a

[1] Story Eq. Pl. § 542.
[2] Am. Code, § 119.
[3] 2 John. Ch. R. 283, 3 id. 553.
[4] Am. Code, § 122.
[5] 11 Paige, 607.

demurrer would lie for defect of parties.[1] One or more of several parties, comprising a large number, may file a bill on behalf of himself and his copartners to rescind a contract, if it appear that it is for the benefit of all the partners that the contract should be rescinded.[2] And where the shareholders of an association are numerous, and the property and management of the affairs of the association are vested in trustees, it was held, that a bill for an account and final settlement was properly filed by one of the shareholders in behalf of himself and the others.[3] And so also a bill against the directors of a mining association, to prevent the money of the company from being appropriated to the use of any persons other than the general benefit of the shareholders.[4]

In Smith *v.* Lockwood, it was held, under the Code at special term,[5] that where the party suing for an injunction to restrain the manufacture of an article, has merely an interest in common with all others in the state who are engaged in the manufacture of the same article, that such party cannot bring a suit in his own name and for his own benefit alone, but must sue in behalf of all others having a common interest with him. Perhaps this is carrying the rule further than necessary. One of several persons, however numerous, having a common interest in obtaining an injunction to restrain a nuisance, may prosecute such action without joining the others. Though he

[1] Story Eq. Pl. § 107.
[2] Id. § 114.
[3] 2 Barb. Ch. R. § 362.
[4] 2 Mylne & Craige, 49, 4 Russ. R. 562.
[5] Per EDWARDS, J. 1 C. R., N. S. 319.

may join the others, and if he do so, the defendant cannot object.

The like doctrine applies to cases where there are many persons defendants belonging to a voluntary association, or other company, or sets of parties, against whom suit is brought. And generally in cases of numerous parties to suits, plaintiffs or defendants, see Story on Equity Pleading, sections 107 to 136.

When a defendant is out of the jurisdiction of the court and cannot be reached by process of the court (or service made pursuant to the cases mentioned in section 135 of the Code), such fact stated in the complaint, and proved (if denied), constitutes of itself a sufficient ground for dispensing with such person being made a party, and the court will render judgment without him. Thus, in action against a partnership, all the partners must be made parties. But if one of the partners be resident in a foreign country, and cannot be brought before the court, and the fact is so charged in the complaint, the court will proceed to judgment against the partners who are within the jurisdiction, provided it can be done without manifest injustice to the absent partner.[1] If, however, such partner has property in the state, and the action arises on contract, or if in any other way pursuant to section 135, an order of publication can be obtained against him, he should be made a party and served with process by publication, &c. And if a complaint against one partner, or joint contractor, show a cause

[1] Cooper Eq. Pl. 35. 3 Cranch, 220.

of action against a firm, and do not show the other partners out of the jurisdiction, and not amenable to the process of the court, it may be demurred to for want of parties.

5. *That several causes of action have been improperly united.*—Whenever the claims or causes of action mentioned in the complaint are so different in their character as to violate in this respect the general rules prescribed by the Code, the objection may be taken by demurrer. These general rules have been considered, and the provisions of the Code in respect thereto have been cited, in the second chapter of this work, to which the reader is referred, entitled *Joinder of Actions*, and but one or two additional remarks will be necessary in this place.

The defect in the pleadings now under consideration, is similar in its character to that which, under the old practice, was called *multifariousness*. Under the Code this defect is also to be deemed waived unless the objection is taken by demurrer or answer.[1]

Multifariousness, as defined in Story's Equity Pleading, is of two kinds. 1st, A misjoinder of causes of suit—that is, when the claims set up in the complaint are of so different a character that the court will not permit them to be litigated in one action. 2d, Where a party is brought in as defendant upon a record with a large portion of which, and of the case made by which, he has no connection.[2] Such an objection is different from that arising from a mere

[1] Am. Code, § 147. An answer can scarcely in any case be necessary.

[2] Story Eq. Pl. § 530. 1 Comst. 221.

misjoinder of claims, and is nearer like the defect of misjoinder of parties.

The first of these, that is, the misjoinder of claims or causes of action between the same parties, is specifically provided for in the seven several subdivisions of section 167 of the Code as amended.[1] And here the remark made in Manchester *v.* Storrs,[2] in respect to a demurrer for the misjoinder of several causes of action, may be repeated, that "we must forget all rules respecting demurrers, and regard a demurrer now as a pleading *created*, with its *character* and *office defined* by the Code. No demurrer will lie except to *a complaint*;[3] nor for any other causes except the six grounds specified in section 122 (now 144)." It may be added that a demurrer for misjoinder of causes of action which can be classed under any of the subdivisions of section 167, will not lie in any case other than those violating such section. It is not, however, to be supposed that actions which do not come under either of these subdivisions, can now be joined with such as do; as, for example, an action for divorce with an action on a promissory note. JUSTICE WILLARD, in the case of Durkee *v.* Saratoga and Washington R. R. Co.,[4] very properly remarked that the commissioners probably had their eye upon actions at law when they framed the 167th section of the Code. There are remedies well known to our jurisprudence which still exist, and which cannot be comprised in either of the subdivisions of section 167.

[1] See ante, page 118.

[2] 3 How. Pr. R. 410.

[3] This was before the Code was amended.

[4] 4 How. Pr. R. 228. 2 Code R. 145.

All, therefore, settled by that section, is that in the seven cases therein specified, several causes of action may be united in the same complaint if the rules prescribed for that purpose in that section be observed.[1]

In cases of different causes of action between the same parties other than those referable to one of these sub-divisions, it is presumed the rule as to a demurrer for the misjoinder is similar to that under the former equity practice. The rule in equity was that if the claims were of a similar nature, involving similar principles and results, and might without inconvenience be heard and adjudged together, they might be joined in the same bill.[2] Such is doubtless still the practice, and a demurrer will only be well taken for misjoinder to a complaint uniting dissimilar or incompatible causes of action; as if a party should seek in the same action to set aside a deed, and to foreclose a mortgage; or to correct a mistake in a writing, and to obtain an injunction; or to set aside a will and for partition.[3] A bill, however, was sustained against a corporation to establish different trusts, created by different instruments, and different donors, at different times for charitable purposes, no other corporation or person being interested.[4] Where, however, a bill sets up one sufficient ground of relief and another distinct untenable claim it has been held not to be multifarious.[5] In such a case under the Code the latter part of the complaint may be struck out on motion. A mere misjoinder of different causes of ac-

[1] Ante, page 127.

[2] See chap. 3. Ante, page 127.

[3] See 1 Comst. 214.

[4] 1 Mylne & Keen, 187.

[5] 5 Paige, 137.

tion is not strictly speaking multifariousness;[1] but such is the general acceptation of the term;[2] and it is well settled that a demurrer will lie for such defect. Thus a bill against an executor for a legacy and for the individual debt of the testator is multifarious.[3] So a bill by a judgment creditor for an account against the deceased creditor's estate and to reach lands in the hands of a third person held in trust for the decedent, and to compel an account of moneys received by such third person from the administrator on a judgment fradulently confessed by the decedent is multifarious.[4] But where the interests of the plaintiffs are the same, although the defendants may not have a co-extensive common interest, but their interest may be derived under different instruments, if the general objects of the suit will be promoted by their being joined, the complaint will be sustained. And see further, as to the misjoinder of different causes of action between the same parties, Story on Equity Pleading, sections 530 to 538.

As to multifariousness, strictly so called, that is, where one, or a part of the defendants is able to say that he is brought in as a party upon a record, with a large portion of which, and the case made thereby, he has no connexion whatever;[5] this also was the subject of demurrer under the former prac-

[1] 3 Barb. Ch. R. 432.

[2] 1 Comst. 221. Story, Eq. Pl. § 530.

[3] 4 John. Ch. R. 199. [4] 2 Barb. Ch. R. 576.

[5] 1 Mylne & Craige, 603. 1 Comst. 221.

tice. It is so also by the Code, which by the last clause of the section under consideration[1] provides:

"But the causes of action, so united, must all belong to one of these classes, *and must affect all the parties to the action, and not require different places of trial, and must be separately stated.*"

The causes of action joined in the same complaint must *affect all the parties to the action.* A joint claim against two defendants is improperly joined with a separate claim against one of them, and either defendant may demur.[2] A single complainant having distinct and independent claims for relief against two or more persons cannot join them as defendants[3] and if so joined a demurrer will lie. But in some cases where the interest of the plaintiffs is joined, though the claims are distinct in respect to the defendants, they may be joined and the objection of multifariousness will be disallowed.[4] And generally it is said that there is no positive and inflexible rule as to what in a court of equity would constitute multifariousness; which is fatal to the suit on demurrer, and the court will exercise a sound discretion in determining whether the subject matters of the suit are properly joined or not, and whether the parties, plaintiffs or defendants, are also properly joined or not.[5] These

[1] § 167.

[2] 1 Barb. Ch. Pr. 59.

[3] 5 Paige, 65. 6 id. 22.

[4] Ante, pages 91 to 93. Story Eq. Pl. § 535. And see cases there cited.

[5] Story Eq. Pl. § 539.

principles, it must be repeated, are only applicable to the demurrer under the Code, in cases, (and they are mainly or entirely for equitable relief,) which do not fall within any of the classifications enumerated in the several sub-divisions of section 167. In cases which do fall within the provisions of this section the rule as to what may and what may not be joined is *created* by the Code and is inflexible.

The causes of action must *not require different places of trial.* If such causes of action be joined, as for example, in ejectment to recover two pieces of land situated in different counties, a demurrer will lie. The Code does not in terms prohibit the joining of different causes of action which require different *modes of trial.* If therefore, it be true, as has been asserted, that the Code has failed in establishing a uniform mode of trial in civil actions, a mere defect of statement on that account, if the causes of action be otherwise well joined, will not be the proper subject of demurrer.

The causes of action must be separately stated. I have heretofore considered this provison of the Code in respect to the complaint, and the proper mode of satisfying this requirement, and have briefly noticed the decisions thereon, and the manner of taking an objection if the provision is violated.[1]

Does the Code authorize a demurrer in a case where several causes of action or defence, otherwise proper to be united, are not separately stated?

On a careful examination of the language of the

[1] Ante, pages 193 to 198, and see also as to separate statement of answers, ante, pages 290 to 293.

Code, together with the decisions that have been made in regard to this point, the question, I think, may be answered in the affirmative. If the causes of action have been "*improperly united*," a demurrer is expressly allowed by the Code. When mingled together so as not susceptible of being separated, are they not "improperly united" within the meaning of this expression?

It is true, such an improper union is strictly a a defect of form, but, as was well said in Boyce *v.* Brown,[1] in regard to duplicity in pleading, it may be doubtful, whether, under the Code as amended, what was matter of form before is not now matter of substance. In some cases also, the party objecting might have a complete remedy on motion to compel the adverse party to make such pleading more definite and certain by amendment, and it does not appear that there can be any objection to this course if preferred. He is not, however, it seems, required to do this but may at once demur.

It has been held more than once under the Code that several causes of action are improperly united within the meaning of section 144, when they are not *separately stated*. It was so held in Pike *v.* Van Wormer;[2] and in Durkee *v.* S. & W. Rail Road Co.,[3] a demurrer was allowed for that cause. It was said in Benedict *v.* Seymour,[4] that if causes of action were not separately stated, that is, divided by some appropriate phrase so as to be distinguishable like the different counts in a declaration, that every alle-

[1] 7 Barb. S. C. R. 87.
[2] 4 How. Pr. R. 226.
[3] 5 How. P. R. 181.
[4] 6 How. Pr. R. 301.

gation not essential to a single cause of action would be struck out on motion.[1] But it was not said in that case that the objection must be taken in that way, and in no other.

In the case of an answer which blended together several grounds of defence, (before the Code was amended so as to allow a demurrer to such answer) judgment was rendered for plaintiff at the circuit without a trial of the issues of facts, for the reason that the answer was not drawn in conformity to the Code,[2] and the judgment affirmed on appeal to the general term.[3] The decision at the circuit was put upon the ground that the plaintiff had no other effective remedy, no demurrer being then allowed in the practice. It was admitted that he might have procured some of the irrelevant and redundant matter to be struck out on motion, but that would have still left the remainder without determining its legal sufficiency. It should be added, however, that the decision at the general term was not put upon the ground that duplicity in an answer rendered it *insufficient* in substance, and liable to demurrer. A subsequent decision, however, at a general term of the N. Y. Superior Court, in a case frequently cited,[4] held that a demurrer for insufficiency would lie not only where the answer sets up a defence which is groundless in law, but where in the mode of stating a defence, otherwise valid, it violates those primary and essential rules of pleading which the Code has

[1] See ante. page 194.

[2] 3 How. Pr. R. 390.

[3] 7 Barb. S. C. R. 80.

[4] Fry *v.* Bennett, 1 C. R., N. S. 238.

prescribed. If this doctrine can be applied to a demurrer to the complaint, then a violation of the manner of stating the allegations in a complaint by blending and mingling together two or more causes of action, so that the same cannot be distinguished, may be demurred to for *insufficiency*, within the sixth and last subdivision of section 144, namely:—

6. *That the complaint does not state facts sufficient to constitute a cause of action.* This is by far the most usual, and perhaps the most important ground for a demurrer to the plaintiff's complaint. A failure to demur, however, does not waive the objection.[1] The judgment obtained may be appealed from and will be reversed, if the complaint does not state facts sufficient to constitute a cause of action.[2] All that a party admits on a default is the truth of the facts alleged against him, and if the record does not show enough to sustain the judgment it will be reversed. And so also even if an answer is put in, and a verdict or report of referees is rendered for the plaintiff.[3]

I had occasion to consider very fully in chapter iv. of this work the subject of the sufficiency of the complaint, and what facts were necessary and essential to be set forth in order to enable the plaintiff to maintain his action. In order, therefore, to determine whether a demurrer may be properly interposed to a complaint under this sixth subdivision, it will

[1] Am. Code, § 148.

[2] Rayner v. Clark, 7 Barb. S. C. R. 581, at General Term, 5th District.

[3] Bristol v. R. and S. Rail Road Company, 9 Barb. S. C. R. 159, General Term, 4th District.

only be necessary to examine the pleading by the rules for testing the sufficiency of the complaint prescribed by the Code, and generally considered in the chapter referred. The question will be: Does the complaint allege *facts* which, if proved in evidence, or admitted, will authorize as a legal conclusion, or judgment of law, the relief which the plaintiff demands? If one or more of such allegations of fact are wanted, the plaintiff may demur. So, too, he may demur for insufficiency, if the complaint shows a former good cause of action, but discharged at the time of suit. *Facts sufficient to constitute a cause of action*, must be construed to mean a *present* cause of action; and if such objection is apparent on the face of the complaint, in analogy to the equity practice, it may be demurred to.[1] There can be no doubt of the application of this rule in the great majority of cases. The amended section 74 of the Code may, perhaps, raise a doubt as to its application to a case where the complaint shows a cause of action barred by the statute of limitations.[2] But it seems to me that full effect can be given to that section without impairing the uniformity of the rule, or excepting this class of cases. The language of the Code is, "the objection that the action was not commenced within the time limited, can only be taken by answer." That is, if it does not appear on the face of the complaint, and the defendant neglects to set it up in his answer, he will be deemed to have waived it. A demurrer in its more liberal sense, (though not in a strict technical sense),

[1] 4 Hen. and M. 473. 1 id. 18. 2 Paige, 280. 4 id. 364.

[2] See this subject further discussed, ante, pages 160, 161.

has been held to be an answer to a bill.[1] So, too, the word "answer," in a case under the Code, has been held to include the word "demur."[2] It was very correctly said in this case, that the word was sometimes so used in the Code. Section 246 provides, that the plaintiff may have judgment, if the defendant fail *to answer*, and on filing proof that no *answer* has been received. Of course, he will not be entitled to judgment if a demurrer has been served, but his affidavit that no answer has been received, is not required to say anything about a demurrer.[3] The word *answer*, therefore, in section 74, may, it is thought, be deemed to include the word demur, and the rule will remain the same as in equity. It was there well settled that if it appear from the face of the complaint, that the complainant has not brought his suit within the time limited by law for that purpose, the defendant might avail himself of the objection by demurrer.[4] The case of Genet *v.* Tallmadge,[5] is an authority to show that the same rule applies under the Code.

If the complaint show a good cause of action and something more; that is, of matters not essential or material to a single cause of action, and not in any sense *constitutive* as matter on which the right of

[1] 6 Peters, 323.

[2] Broadhead *v.* Broadhead, 4 How. Pr. R. 308.

[3] 4 id. 309, per PARKER, J.

[4] 7 Paige, 195, 373. 4 Yerger, 94. Story Eq. Pl. § 484, and cases there cited.

[5] 1 C. R., N. S. 346; and see also The People *v.* Arnold, 4 Comst. 508.

action depends[1] be alleged, the defendant cannot demur thereto. It has been repeatedly held that a demurrer must go to an entire complaint, and will not lie to a part thereof.[2] Nor will a demurrer lie to immaterial matter in a pleading, or for irrelevancy, or uncertainty, or other superfluous matter.[3] But this, as has been observed, is not to be extended to the improper union of two or more causes of action in the same complaint in violation of section 167. One or more of such causes of action, it is true, may be redundant or surplusage, but a demurrer, as we have seen, is expressly allowed for that cause by the Code, unless, perhaps in the case where a good cause of action is united with one entirely untenable, in which case, the latter may be struck out. When it is said, too, that a demurrer must be to an entire complaint, it is meant only to an entire cause of action in a complaint. If there are several causes of action or counts set forth, separate demurrers may be interposed. And it was said in Ogdensburgh Bank *v.* Page,[4] that a complaint avowing several distinct acts done and committed by the defendants, and insisting that by *each* of said acts the defendant became liable to pay, might be regarded as analogous to a declaration containing several counts, and separate demurrers might be interposed to erch cause of action.[5]

[1] 4 Sand. 666.

[2] 3 How. Pr. R. 410, 6 id.— 4 id. 413.

[3] Id. 2 Sand. 702, 1 C. R., N. S. 325, 6 How. Pr. R.

[4] 2 Code R. 75.

[5] And query within the cases cited, ante, pages 195 to 197, would not a demurrer to the whole complaint for not stating each cause of action separately have been well taken?

An objection to the mere form of expression which the plaintiff uses, and to the phraseology, is not matter of substance, and is not subject to demurrer. If in substance correct, but not in form, the party aggrieved should require the pleading to be made more definite and certain by amendment.[1]

In addition to the cases already mentioned in which a demurrer may be proper for an insufficient statement of facts, and what was said as to the sufficiency of the complaint, ante, chap. iv., one or two further remarks only will be made in conclusion of this subject.

The Code has apparently assimilated the demurrer to the complaint under the new practice, to the same mode of proceeding under the former practice in equity. Whenever therefore, generally, a demurrer to the *substance* of the bill would have been proper under that practice, a demurrer for a like defect may be allowed by the Code. There are, however, some exceptions: Thus demurrers were allowed for the reason that the value of the matter in suit or amount in controversy was frivolous; fixed by statute in this state at $100.[2] Since the abolition of the distinction between legal and equitable remedies, this provision is probably no longer in existence. So too on a bill brought to enforce a penalty or forfeiture, or to obtain relief for which the plaintiff had a clear remedy at law, a demurrer would lie. This of course is no longer applicable to the new practice.

[1] Howell *v.* Fraser, 1 C. R., N. S. 270, Special Term, per MITCHELL, J.

[2] 2 R. S. 13 ed. § 61, page 234, 4 Paige, 364.

In most cases, however, a demurrer to a complaint for defect of substance, will be proper where a demurrer to a bill for the same cause would have been sustained. Thus the objection may be so taken when the complaint shows that the plaintiff has no interest in the subject matter, and no title to institute a suit concerning it.[1] As if the complaint does not make out an equitable case in the plaintiff to the relief which he seeks; or if a suit be brought by one creditor against another to deprive him of a priority which he had lawfully obtained without any fraud.[2] So in case the complaint shows a claim which is unlawful, or against the policy of the law; for in such and like cases there is a defect of title to maintain the suit.

Want of interest in the subject matter of the suit is not only a good cause of demurrer, in the case of a sole plaintiff, but if the suit is joint, want of interest in either of the plaintiffs is equally defective.[3] As if one of the parties be a mere agent of the other and have no further interest.[4] So also if two parties sue and the title is alleged to be in the one or the other of them in the alternative, for this shows that there must necessarily be a misjoinder of one or the other of the parties.[5]

Want of interest in the defendant in the subject matter, is also a matter of substance, and demurrable if it appear upon the face of the complaint. Thus a married woman made a party defendant in an action

[1] Cooper Eq. Pl. 166, 169, Mitf. Eq. Pl. 154, 231.
[2] Id. [3] Story Eq. Pl. § 509 and §§ 231 to 237.
[4] 1 Barb. Ch. R. 157. [5] See ante, page 93.

on contract, as on a bond or promissory note executed jointly by herself and husband, may demur. The complaint should not only show that the defendant has an interest, but also that he is liable to pay the plaintiff's demand. And in general if the case stated is such, that, admitting the whole complaint to be true, the court ought not to give the plaintiff the relief or assistance which he requires, in whole or in part, against all or against any of the defendants, it is not only a sufficient, but an appropriate ground of demurrer; and the objection thus appearing on the face of the complaint should be taken by demurrer, and ought not to be taken by plea.[1] This rule derived from the former mode of pleading in equity cases is conceived to be equally applicable to pleadings under the Code.[2]

The manner of pleading the demurrer, and of stating the ground of the alleged objection, will be considered under its proper head in this chapter.[3]

[1] Story Eq. Pl., § 526. [2] Hoxie v. Cushman, 7 L. O. 149.

[3] Post, section iv. of this chapter.

SECTION III.

WHAT MATTERS IN THE ANSWER OR REPLY MAY BE DEMURRED TO.

UNDER the former equity practice a demurrer was applicable to a bill only, and could not be put in to a plea or answer. If the answer was bad in substance, and no proof was required by the plaintiff, the cause could be heard upon bill and answer. This practice was retained by the original Code. No demurrer was allowed to an answer or reply. And if an insufficient answer was put in, it seems, the defendant might move to strike it out or for leave to proceed as for want of an answer.[1] Or, as in Boyce *v.* Brown,[2] if the case was brought on at the circuit, judgment would be rendered for plaintiff, (in analogy to cases in equity), on complaint and answer.

This practice was found to be inconvenient; accordingly in the amendments made to the Code in 1849, the defect was remedied by allowing a demurrer to both answer and reply. Section 153 provides that the plaintiff may demur to the answer; "for insufficiency, stating in his demurrer the grounds thereof; and the plaintiff may demur to one or more of sev-

[1] 1 C. R. 72. [2] 3 How. Pr. R. 391, 7 Barb. S. C. R. 80.

eral defences (and set-off,) set up in the answer, and reply to the residue.[1]"

The words "and set-off" were added by the amendment of 1851; and the words "defences and set-off" struck out and "counterclaim" inserted by the amendment of 1852.

Section 155 allowing a demurrer to the reply, remains the same as passed in 1849.

"If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof."

It will be observed that a demurrer to both answer and reply is allowed only for one cause, *insufficiency*. It may be a question and frequently is, and one which we have had occasion several times to allude to in the course of this work, what is the meaning and extent of the term *insufficient* as used in these sections of the Code. Is an answer or reply to be deemed *insufficient* only when defective in substance, or is it *insufficient* in this sense when it fails to comply with the rules of pleading prescribed by the Code?[2] This subject was considered, ante, chap. vi. section 1, when treating of the reply, and the reader is referred to what was there said. The conclusion arrived at in Fry *v.* Bennet[3] there cited, seems in all respects satisfactory, and most in accordance with the spirit and meaning of the Code, namely,

[1] Am. Code, § 153.

[2] See 6 How. Pr. R. 21.

[3] 1 C. R., N. S. 252.

that an answer (or reply) is to be deemed *insufficient* in the sense of the Code, not only when it sets up a defence which is groundless in law, but when in the mode of stating a defence otherwise valid, it violates those primary and essential rules of pleading which the Code has studiously retained. In that case this principle was applied where the defendant attempted by a general averment in an answer to justify the publication of a libel. The court held that a mere repetition of the charge made in the libel, or a simple averment that it was true without setting forth, with requisite certainty, time, place, persons, and the particular acts which the defendant intends to give in evidence in support of his defence of justification is bad pleading, and an insufficiency for which a demurrer would lie under the Code.

The word "insufficient," in its largest sense, may, indeed, be thus construed, without any violence to language; and, although the Code specifies six general grounds of demurrer to a complaint, and but one to a reply or answer, I do not see why this one may not be held to include all. If, for example, the answer sets up a counterclaim, which, as we have seen, is in the nature of a cross-action between the parties, and should be stated substantially the same as an original complaint;[1] whatever defect would have been fatal on demurrer to such a defence, if stated as a new action, may be now interposed to it for "insufficiency" under the Code. Thus, if it show on its face another action pending for the same cause, or several causes of action, (counterclaims) improperly

[1] See ante, chap. v. sec. 4.

united, it is manifestly insufficient as a defence under the Code, or, if any material allegation or averment, which it is necessary to prove on the trial in order to sustain it, be omitted, it is also insufficient. These remarks are equally applicable to the reply.

So, too, the Code requires that if there are several defences, they shall each be separately stated, and refer to the causes of action which they are intended to answer, in any manner in which they may be intelligibly distinguished. This, too, is an essential rule of pleading retained by the Code; and, though in Fry *v.* Bennett it was not decided, though certainly intimated on the strength of Boyce *v.* Brown,[1] that such a defect alone would be a valid ground of demurrer, yet, the general principle involved in that decision seems very clearly to establish this result. The same may be also said of the reply. Applying this principle to it, the defendant may treat it as *insufficient*, and demur whenever it is found to violate any provision of the Code, respecting what it shall contain, and also in the manner of statement. It may be demurred to, not only for setting up facts which do not constitute a defence to the new matter of the answer, but also when such facts are inconsistent with the complaint, or unnecessarily repeated in the reply.

Many of the rules of pleading relative to a demurrer to a complaint, as laid down in the last section, are equally applicable to an answer or reply. Thus, we have seen that a demurrer must go to an entire

[1] 7 Barb. S. C. R. 80.

complaint, and will not lie to a part thereof. The same has been expressly held of the answer, as where a defendant selected several sentences forming a part of the statement of one entire defence, and demurred to them, replying to the residue. The question was, whether the defendant could demur except to an entire defence. GRIDLEY, J. overruled the demurrer, adding that he would have struck it out had a motion been made to that effect.[1] In a recent case,[2] however, it has been doubted whether the demurrer is such a pleading as can be corrected on motion to strike out, unless in the case of a frivolous demurrer, provided for by section 247.

And, in an answer or reply, as well as in a complaint, a demurrer will not lie to immaterial matter, or for irrelevancy, or uncertainty, or other superfluous matter. If the whole matter of the answer is unavailing, and is no defence to the plaintiff's claim, it may be demurred to;[3] but if unimportant matter, having no bearing upon the controversy, is mixed up with it, or the allegations otherwise constituting a defence, are indefinite or uncertain, the remedy is by motion.[4]

Nor will a demurrer lie for a mere informal manner of statement, when no essential requisite of pleading prescribed by the Code has been violated; as if the plaintiff should use the abbreviation *vs.* for the Latin word *versus*, in the title of the complaint.

[1] Cobb *v.* Frazee, 4 How. Pr. R. 413.

[2] Smith *v.* Brown and others, 6 How. Pr. R. 383.

[3] 6 How. Pr. R. 475.

[4] 3 Sand. 743. 1 C. R., N. S. 325.

Demurrer to denial.—It was said in Smith and others *v.* Greenin and another,[1] that a plaintiff can demur for insufficiency only to new matter which is set up by way of defence. It is presumed nothing more is meant by this than that it is no ground of demurrer if a defendant omits to deny any allegation of the complaint, or if his pleading does not really amount to a denial. It would be inconsistent with the decision made at General Term of the same court, which has been several times cited in this chapter,[2] to say that a denial in an answer or reply, which violated a primary and essential rule of pleading recognized by the Code, was not liable to demurrer. This has been expressly decided in the Supreme Court at Special Term, and a demurrer held to apply to a denial as well as to new matter; the word "same" in section 153 was said to refer to the word "answer," and not to "new matter."[3] Such seems the correct view of the case, and it is believed is generally adopted in practice.* Thus, the answer is required to con-

[1] 2 Sand. 702.

[2] Fry *v.* Bennett, 1 C. R., N. S. 238.

[3] Hopkins *v.* Everett, per BARCULO, J. 6 How. Pr. R. 159.

* NOTE.—The case of Thomas and Plumb *v.* Harrop and others, 7 How. Pr. R. 57, reported since this was written, maintains the contrary doctrine. That case holds that a plaintiff cannot demur to an answer which does not purport to do more than deny some of the allegations in the complaint. It is directly in conflict with the above decisions, which I conceive sustain fully the doctrine laid down in the text, a doctrine which appears to me most sound in principle and convenient in practice. I prefer therefore to let the text stand precisely as written before seeing the opinion referred to. It may be further remarked in this place that there is scarce-

tain a general or specific denial of *each* material allegation which the defendant intends to controvert. In the case last cited the defendant, instead of denying *each* allegation, denied *all* connected together; that is, he denied that he did "assault the plaintiff, *and* seize him by the collar, *and* shake him violently." This was a mere evasion, and it was very properly said in that case that the oath adopted by the Code is for the purpose of requiring the defendant to admit so much of the charge as he cannot conscientiously deny, and thus narrow the issues to those points which are really in controversy. If, therefore, the defendant had wished to put the whole complaint in issue he should have denied each charge disjunctively. So, too, for the same reason, on a general denial now allowed by the Code, it would seem that, if the defendant merely denies generally that the whole com-

ly a section of the code more difficult of construction than this (section 153) which allows a demurrer to an answer. It has been suggested that from the language of the section as amended in 1852 a demurrer can be interposed only to an answer setting up *a counterclaim*. But I am unwilling to adopt this construction. The word *counterclaim* was inserted in the section in place of the words "*defence or set-off*," and if such construction be correct, then, of course, a demurrer could not have been taken to a mere denial. But it was expressly held in Hopkins *v.* Everett, above cited, before the amendment, that the section was not to receive this narrow construction; the word "same" it was said referred to the word "answer" and not to "new matter" and therefore a demurrer was authorized to the answer generally, whether it consisted of a denial or of new matter. This seems to me to be not only a judicious but a necessary construction of the statute, and one which the profession are at liberty to regard as controlling. Nor is such rule of construction at all affected by the amendment of 1852.

plaint is true, and does not deny generally *each* allegation in the complaint, the defect will be the subject of demurrer.

The rule is the same in respect to a demurrer to the reply. The Code has prescribed, in exactly the same words used in respect to the answer, the manner of denial, by way of reply to new matter in the answer.[1] If the denial do not refer distributively to the allegations in the answer, by the use of some word, such as "each" or "every," it will be liable to demurrer.

Demurrer to new matter.—We have seen, ante, chapter v. section 3, in what cases the defendant *may*, and in what cases he *must*, set up a defence by way of new matter in his answer; and so also, ante, chapter vi. section 1, in respect to the reply. The mode and manner of stating such facts have also been particularly noticed in those sections. The new matter set up in the answer, and also in the reply, is required to be, in the language of the Code, "new matter *constituting a defence*;" in the first case, to the plaintiff's complaint; and in the second, to the new matter set up by defendant.

This means, that the new matter set up must be an entire defence; or in other words, a bar to the action, or to such part of it as it professes to answer. Matters in mere mitigation of damages, as in an action for libel, it has been held, is not a *defence*, nor is such matter when pleaded the subject of a demurrer to the reply.[2] But this does not extend to a partial de-

[1] Am. Code, § 153.

[2] Newman *v.* Otto, 4 Sand. 668.

fence set up by way of counterclaim, such as recoupment of damages, or set-off, which is required to be specially pleaded, even though such counterclaim do not profess to be an *entire* defence.[1]

Though in an action for libel the defendant may justify and allege mitigating circumstances, yet, as we have had occasion to notice before, unless the matter in mitigation of damages is accompanied by a justification, it cannot be alleged, and is demurrable.[2] It was said in that case, and has since been repeatedly held,[3] that the rule now is the same as before the Code, namely, that partial defences which did not affect the *right* of recovery, but the *amount* merely, are not issuable matters, and cannot be pleaded, but may be given in evidence on a denial; such as the bad character of the plaintiff,[4] and any other matter which does not constitute an entire defence to the action. In an action for libel, malice in the defendant is the gist of the action, and he may now set up the want of malice as a defence by specific answer.

The answer must be not only a defence, and an entire defence, but if it assumes to be a defence to the whole cause of action, and is only a defence to part, it is insufficient, and such defect will be a cause of demurrer.

The subject of inconsistent answers and defences has already been considered.[5] When, and in what

[1] Willis *v.* Taggard, 6 How. Pr. R. 433.

[2] Graham *v.* Stone, 6 How. Pr. R. 15; and see also, ante, page 265.

[3] 4 Sand. 664. [4] Contra, 6 How. Pr. R. 160.

[5] Ante, pages 284 to 288.

cases they are defective and liable to demurrer, will be seen by reference to that branch of the subject. And generally as to the sufficiency of new matter in the answer, and the mode and manner of the statement thereof, the reader is referred to chapter v. section 3.

It is scarcely necessary in this place again to remark the entire and complete analogy between a defence by way of reply to new matter in the answer, and a defence to the plaintiff's complaint. As to insufficiency in the reply, therefore, the same reference may be made, and also to chapter vi. section 1, which treats specifically of that subject.

Demurrer to Counterclaim.—The counterclaim set up by the defendant in his answer to the plaintiff's complaint, it has been seen, is similar in its nature to a new action, and the rules governing the manner of such statement are the same.[1] And generally a demurrer will lie to such counterclaim for *insufficiency* in those cases where a demurrer would lie to the same matter if set up in an original complaint.[2]

The Code, as we have seen, requires the counterclaim to be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action.[3] No other is authorized to be set up, and if a violation of the rule appears on the face of the pleading it will be good ground for demurrer. Thus where A, in a joint action brought by B & C, pleads a counterclaim existing

[1] Ante, chap. v. § iv.

[2] See ante, sec. 2 of this chapter.

[3] Am. Code, § 153.

against B alone, it may be demurred to unless it also appear that a separate judgment may be proper in respect to the subject matter between A & B.

So if a counterclaim is not connected with the subject of the action within the rule as we suppose it to be established,[1] or does not arise out of the contract or transaction which is the foundation of the plaintiff's action, such defect if apparent and capable of being pointed out in the pleading is a valid ground of demurrer. Thus in an action on a note given on the sale of real estate, if the defendant should set up by way of recoupment, as a counterclaim, that the plaintiff subsequent to the sale committed a trespass on the lands, it would be manifest bad pleading and liable to demurrer. But matter which could heretofore have been properly introduced in evidence to mitigate or defeat damages by way of recoupment, though formerly it could only be set up by way of a notice, and could not be pleaded, may and must now be stated in the form of an answer, and is not demurrable as a partial defence.[2] So too in respect to a set off, the Code requires it to be alleged as a counterclaim in the answer, and it may be so alleged either as a full or partial defence, and though, as has been seen, a set off is considerably more extensive under the Code than formerly under the Statute,[3] it now embracing matters of unliquidated as well as liquidated damages in all cases in actions on contracts, and being allowed in all cases of actions on contracts, yet it must be

[1] Ante, pages 305, 306.

[2] Willis v. Taggard, 6 How. Pr. R. 433.

[3] Ante, page 301, 302.

confined strictly within these rules of the Code. If A. undertake to set-off damages arising on contract in a suit brought by B. for damages for a tort or wrong, the remedy is by demurrer. And so if the action is on contract, and the set-off appear on its face to have accrued to the defendant after the commencement of the action, the plaintiff may demur.

SECTION IV.

HOW THE GROUNDS OF DEMURRER ARE TO BE STATED.

THE consideration of the subject of this section involves a difficulty arising from conflicting decisions that have been made in respect to the question whether, under the Code, a general demurrer is allowable, or whether the party demurring is not bound to point out specifically the defects and omissions which he claims render the pleading bad for the cause specified.

Section 145, as amended in 1849, (the words in italics being the amendment), and as it now stands, is as follows:

"The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be dis-

[1] Smith v. Brown and others, 6 How. Pr. R. 385.

[2] Am. Code, § 247.

regarded. *It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.*"

Section 153, allowing a demurrer to the answer, as amended in 1849, 1851, and 1852, is as follows:

"Or he may demur to the same for insufficiency, stating in his demurrer the grounds thereof; and the plaintiff may demur to one or more of several counterclaims set up in the answer, and reply to the residue."

Section 155, allowing a demurrer to the reply, as originally passed in 1849, and as it now stands, is as follows:

"If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof."

It will be observed that in each of the above cases the party demurring is expressly required to "state the grounds" of his objection. In the case of a demurrer to the complaint, he must "distinctly specify" such grounds of objection, and if he do not, the demurrer may be disregarded; that is, treated as a nullity, (the plaintiff having returned it, or notified the defendant that it would be disregarded,[1]) and the plaintiff may thereupon enter judgment, as in case of a default.

The Code is silent as to how a demurrer to an answer or reply is to be treated, when such demurrer does not state the ground of the insufficiency. I understand, however, the practice to be that it may be treated in the same way as a demurrer to a complaint

[1] See practice on disregarding a pleading, ante.

which is defective in this particular. A demurrer, it has been said in a late case, is a pleading which is not properly within the 160th section of the Code, so as to be the subject of a motion to strike out or make more definite;[1] unless, indeed, in case where, by the Code, the demurrer is clearly frivolous.[2] If this summary manner, therefore, of treating the demurrer as a nullity were not allowed, the party aggrieved would have no remedy except to bring it on for argument in the usual way.

JUSTICE WILLARD said in the case of Durkee *v.* Saratoga & Washington Rail Road Company[3] that "there is nothing in the Code which requires the party demurring to specify the ground of his demurrer more distinctly than to indicate to which of the six classes it belongs." And he accordingly held that a demurrer to a complaint which specified the grounds of demurrer in this way; "1. That several causes of action have been improperly united." "2. That the complaint does not state facts sufficient to constitute a cause of action," contained a sufficient specification of the ground of objection within the meaning of the Code. This followed the decision in Swift and another *v.* Dewitt,[4] although JUSTICE GRIDLEY in holding, in that case, that a ground of demurrer was well assigned which stated: *that the complaint does not state a sufficient cause of action*, admitted that there was a class of cases in which this general form

[1] Smith v. Brown and others, 6 How. Pr. R. 385.

[2] Am. Code, § 247.

[3] 4 How. Pr. R. 226.

[4] 3 Id. 281.

of demurrer might not be sufficient; as for example to say generally *that the complaint showed there was a defect of parties*, without specifying who should be joined or who were misjoined. He thought, however, it would be sufficient to say generally that *the complaint shows on its face another action pending between the parties;* and so it was sufficient also to say that it shows no cause of action.

JUSTICE MASON, in Hyde *v.* Conrad,[1] at special term, following these decision, regarded the question as settled on *authority*, notwithstanding a contrary decision in Glenny *v.* Hitchings, and applied the rule to the case of a demurrer to the answer, where the grounds of demurrer set up was that *the facts stated are not sufficient to sustain the defence, or to constitute a valid defence to the complaint.* And JUSTICE WILLARD in a subsequent case[2] decided the same thing, where a demurrer to an answer assigned as ground of demurrer that the answer "does not state facts sufficient to constitute a defence."

The correctness of these decisions has been questioned, and the contrary held in several cases. Thus in Glenny *v.* Hitchings[3] JUSTICE SILL held a general allegation in a demurrer, that *facts sufficient to constitute a cause of action are not stated in the complaint*, to be an insufficient specification of the grounds of demurrer within the meaning of the Code. JUSTICE HAND, at the Albany special term, October, 1849,[4] made a similar decision, holding a de-

[1] 5 How. Pr. R. 112.

[2] Anibal *v.* Hunter, special term, Jan'y, 1851, 6 How. Pr. R. 255.

[3] At Chambers, 4 How. Pr. R. 98.

[4] White *v.* Low, 7 Barb. S. C. R. 204.

murrer badly assigned which alleged that *it does not appear that the plaintiff had any title to the note when the suit was commenced.*[1] And in a very late case at the Dutchess special term[2] JUSTICE BARCULO in a carefully considered opinion held, in accordance with the latter class of cases above mentioned, that the Code had abolished general demurrers and that the particular objection must be specifically pointed out. This case involved the consideration of a demurrer to a cause of action which simply alleged that the complaint did not set forth sufficient facts. The opinion, to which the reader is referred, certainly presents some forcible, if not conclusive, reasons in favor of the propriety of this construction.[3]

A question which has thus arrayed such respectable authority on both sides, may be said emphatically to be still a *questio vexata*, and will probably remain so until put to rest by some controlling decision of the Court of Appeals, or by legislative enactment. All that it can be necessary or useful to say here in respect to it is simply this: It will in all cases be correct practice, and is proper and prudent (not to say absolutely necessary) to specify particularly the ground of the objection when the same can be done; accompanying it, if the pleader choose, with a general allegation *that the facts alleged do not constitute a cause of action, &c. &c.* Thus if a demur-

[1] And see note to case of Schwab v. Furniss, in N. Y. Superior Court. 1 C. R., N. S. 342.

[2] 6 How. Pr. R. Purdy v. Carpenter & West.

[3] And see also on the same point the cases of Grant v. Lasher, 2 C. R. 2. Hunter v. Frisbee, Id. 59.

rer for want of jurisdiction be interposed, it may perhaps, in some cases, be sufficient generally to say, that the complaint shows a want of jurisdiction of the person of the defendant, or of the subject matter, but surely it can be no particular hardship to point out briefly and clearly in what consists the want of jurisdiction. And so too in other cases, as that the plaintiff has not legal capacity to sue, or that the proper parties, plaintiff or defendant, have not been united. It was certainly the rule in equity that a demurrer put in for want of the necessary parties must show who were the proper parties from the facts stated in the bill, not indeed in all cases by name, for that might be impossible, but in such manner as to point out to the plaintiff the objection to his bill, and to enable him to amend by making proper parties.[1] The same reason would apply, and with great force, to the case of a general allegation that the complaint or defence does not state facts, &c. If the particular omission was pointed out, or the particular cause of defect, the party pleading it might be enabled to amend. The case of Russel *v.* Clapp,[2] and kindred cases, decided in respect to the answer, seem to me not entirely inapplicable to the theory of the Code relative to the demurrer. "Each party," says the Court in the case last cited, "should present in his pleading the facts which he intends to establish by proof, if controverted, and upon which *he expects the law to be pronounced.* These facts should be so presented that upon the trial the Court

[1] Story Eq. Pl. § 543, and cases there cited.

[2] 7 Barb. S. C. R. 482.

can see from the pleadings what facts are disputed and what are not; and be able to proceed to the determination, first of the disputed facts, and then of the right of the parties as established."

Doubtless there are cases in which, from their nature, a general allegation in the language of the Code would not only be sufficient, but proper. Thus, if a demurrer is taken for the cause that "there is another action pending between the same parties for the same cause," and the complaint plainly show this on its face, (which rarely happens) there can be little doubt, as was said in Swift *v.* Dewitt, supra,[1] that a demurrer in these words alone would be proper. In such case it might be difficult to make a more distinct or particular specification of the grounds of demurrer. But in nearly every other class of cases such particular specification can, and, whenever necessary to apprise the other party of the exact point of objection, should be made, or if not made, the court, on the trial or hearing, might, in a proper case, refuse to permit the point to be raised. Thus, if the plaintiff demur on the ground "that several causes of action have been improperly united," the question might arise as to what "improper" union the party objecting meant; whether a union of two causes of action separate and distinct in themselves, and not referable to one only of the classes specified, or a union by blending and mingling together, contrary to the Code, two or more causes of action which might be properly united if separately stated, or omitting to number them as

[1] Ante page 417.

required by the rules.[1] In such case it would be manifestly proper to state distinctly the precise point of the defect, which it is intended to raise on the argument, and if not done, I think the court, in analogy to the practice on general and special demurrer under the old system, should refuse to permit any other question to be raised on the argument than the general question whether the causes of action are compatible. Indeed, it has been expressly held in case of a demurrer to an answer under the Code,[2] that if the demurrer does not specify the grounds thereof the objection cannot afterwards be taken on the argument. The same principle is doubtless well applied to a demurrer to a complaint or reply.

SECTION V.

OBJECTION TO PLEADING WHEN TO BE TAKEN BY ANSWER, WHEN ON MOTION OR BY DEMURRER, AND WHEN DEEMED WAIVED.

An objection to a defective pleading may be taken in various ways. Sometimes it can be done only by demurrer; sometimes a motion to strike out the defective pleading or matter is the proper course; some-

[1] Sup. Court, Rules 74.

[2] Kneiss v. Seligman, 8 Barb. S. C. R. 439. 5 How. Pr. R. 425.

times a party has his election to adopt one or the other mode; and sometimes the objection can be raised by answer alone.

These various modes of objection to a defective pleading have already been considered to some extent in the course of this work, their distinction pointed out, and perhaps most of the decisions upon the subject referred to. It may, however, be useful briefly to present in this place a summary view of the question, for convenience of reference;—and first, in what cases should the objection to a pleading be taken:

By answer.—A party may either demur to, or answer, the previous pleading of his adversary. He may do the one or the other, but cannot do both to the same cause of action. If he answers, his demurrer is waived, though it is presumed he might be permitted by the court, on terms, and on good cause shown, to withdraw an answer, and demur. When a demurrer has been overruled, the party demurring is not entitled to put in an answer as a matter of right, but the court in its discretion may allow him to do so on such terms as may be just, *if it appear that the demurrer was interposed in good faith.*[1]

Under the old practice, where a demurrer was not frivolous, the court would allow it to be withdrawn on payment of costs, after they had ruled against it, on application made at the same term before judgment was entered.[2] Otherwise, if the demurrer was frivolous, even though the application was accompa-

[1] Am. Code, § 172.

[2] 1 John. C. 411. 2 id. 284. 3 id. 300. 3 John. 140. 2 Caines, 369.

nied by an affidavit of merits.[1] And by statute, where the demurrer was special for form, and overruled, judgment was absolute, and no plea or other defence could be allowed.[2] This, however, did not apply where the objection could be raised by general demurrer.[3] Under the Code it must appear, in all cases, that the demurrer was *interposed in good faith*, in order to authorize the court to allow an answer at all. Thus, the judgment, if a frivolous demurrer is of such a nature as to be clearly apparent that it is put in as a sham defence, will be final, and no affidavit of merits can help it.[4] In every other case it is within the discretion of the court, on overruling a demurrer, to allow an answer or not; but the usual course is on overruling the demurrer to give leave to the defendant to answer on payment of costs, without any affidavit of merits. If this provision, however, be not included in the order overruling the demurrer, the defendant may obtain it on motion, supported by an affidavit of merits, and that his demurrer was interposed in good faith.

It is to be observed that the answer is proper only to raise an objection to a pleading where that objection does not appear on the face thereof, as for want of parties, another action pending, &c. &c. An answer which undertakes to raise an objection to the

[1] 1 John. 135. But see 10 Wend. 623.

[2] 2 R. S. (3d. ed.) 448, § 23. [3] 7 Wend. 461.

[4] Though it seems there are cases in which, on an affidavit of merits, a defendant might be allowed to answer on the overruling of a frivolous demurrer, the court being satisfied that it was put in in good faith. Appleby *v.* Elkins, 4 Sand. 673.

complaint of any one of the causes of demurrer enumerated in section 144, where the objection appears on the face of the pleading, may be regarded as *insufficient*, within the meaning of the Code and the cases cited, ante, pages 409, 410.[1] If the party intend to raise such objection he should do so by his demurrer, leaving the other matters in the complaint unanswered. Perhaps there is no exception to this rule, not even in the case of a complaint which upon its face shows a demand barred by the statute of limitations, notwithstanding the provisions of section 74 of the Code. The word "answer" in that section, being construed to include "demurrer,"[2] it would, therefore, be improper for the defendant to set up, in the same answer, the statute of limitations, with a denial or avoidance of the cause of action. Such a defence would be in the nature of an answer and demurrer to the same cause of action, and would be bad if properly objected to.

Objection when taken by demurrer or on motion.— We have remarked that sometimes a demurrer is the only proper way to take the objection, sometimes it can be reached only on motion, and sometimes the party has his election. These distinctions have already been considered and noticed in the first three sections of this chapter. The following is a summary of the principles recognised by the Code, and which have been established by the leading decisions on this point:

1. Irrelevant and redundant matter cannot be de-

[1] See Hoxie v. Cushman, 7 L. O. 149.

[2] See ante, § 2, of this chapter.

murred to, but the objection must be taken by a motion to strike out. This has been held in several cases which have been already cited, and may be considered as well settled. Irrelevant and redundant matters are allegations which have no bearing on the subject in controversy, and cannot properly be put in issue, when found in connection with such as are pertinent and constitute a cause of action or defence. A demurrer is proper only when an entire pleading is defective.[1]

2. Nor is a demurrer proper in like cases, where the allegations are indefinite or uncertain. The remedy must be on motion to make the pleading more definite and certain by amendment.[2]

3. But the motion to strike out is not confined to mere matters of redundancy and surplusage. It may be made to an entire defence or answer, when such answer is *sham* or *irrelevant*.[3] And so, where an answer or reply is *frivolous*, an application may be made for judgment on that ground.[4]

4. In some of these cases, however, the plaintiff may demur, and is not necessarily driven to his motion to strike out; thus, he may demur to an answer or defence which is *irrelevant*, or he may move to strike it out under section 152. "A pleading," says JUSTICE STRONG, "is *irrelevant* which has no substantial relation to the controversy between the parties to the suit"[5]—such a pleading must, of course, be

[1] 3 Sand. 743. 6 How. Pr. R. 475.

[2] 2 Sand. 702. 6 How. Pr. R. 221.

[3] Am. Code, § 152. 6 How. Pr. R. 475.

[4] Am. Code, § 247, and see ante, pages 320, et seq. 358, 359.

[5] Seward *v.* Miller, 6 How. Pr. R. 312, and see ante, page 326.

insufficient. And so, too, a frivolous reply or answer may, if the party prefer, be demurred to as insufficient, although the Code gives a more summary remedy by an application for judgment. And it is recommended as the most correct practice that if there exist any doubt as to the character of the defence, or answer, in respect to its sufficiency, that is, whether it is really a frivolous or irrelevant defence or not, it is always proper to demur, instead of attempting to get relief on motion, for the reasons alleged in Darrow *v.* Miller:[1] namely, that, in analogy to the old practice, an answer must be palpably frivolous to such a degree as to satisfy the court that it was interposed for delay, or some other improper motive,[2] before it will be struck out on motion. If not so, the court will deny the motion and leave the party objecting to his demurrer.[3]

5. A sham answer, it seems, is to be disposed of only on motion to strike out, and is not the subject of demurrer; that is, adopting the strict definition of the term, that a *sham pleading* is one which is good on its face, but false in fact.[4] *

[1] 5 How. Pr. R. 249.

[2] 1 Hill 370, 672, 663. 18 Wend. 680. 4 Cow. 142.

[3] 6 How. 21, 312. 4 Sand. 660, and see on this subject pages 324, to 327 and cases there cited.

[4] 6 How. Pr. R. 355. 5 Id. 249.

* The above general rules are very concisely and well stated by JUSTICE BARCULO, in Nichols *v.* Jones, 6 How. Pr. R. 358, as follows: "If an answer otherwise good is loaded with unnecessary and redundant matters, the plaintiff's counsel should move, under section 160, to have such matters expunged. If doubts are entertained as to the sufficiency in law of the answer, and the opinion of the court is desired, it must be obtained by demurrer. If, however, any de-

6. Where pleadings are defectively stated; that is, where they violate some essential rules of pleading adopted by the Code, as where the reply is inconsistent with the complaint, or where two or more defences are mingled and blended together, &c. it seems that a demurrer may be allowed;[1] but the party aggrieved may also move to strike out, or make the defective pleading more definite and certain; and he should be required to resort to his motion whenever the defect can be effectually corrected in that way.

Objection when deemed waived.—This is particularly provided for by the Code. Every objection which may now be taken by demurrer, or which, if not appearing on the face of the complaint, should be set up in the answer, is deemed *to be* waived by a failure to demur or answer, except only the objection to the jurisdiction, which may be raised at any time, and the objection that the complaint does not state facts sufficient to constitute a cause of action.[2]

This section (sec. 144,) is exclusively applicable to the pleading on the part of the *defendant*. There seems to be a defect in the Code in not extending it to the plaintiff's reply to a counterclaim. Thus, if a defendant do not demur for misjoinder of parties appa-

fence is palpably insufficient, a motion for judgment on the ground of frivolousness is the proper course; and if the matters of defence can be shown to be clearly *false*, a motion to strike out as sham will reach the evil."

[1] See what was said on this point, ante, pages 409, 410

[2] Am. Code, § 144.

rent on the complaint he is held to have waived the objection, but if the same defects occur in the counterclaim, the plaintiff may omit to demur or otherwise point them out to the defendant, and yet be in a situation to take advantage of them on the trial. A alone may thus sue B on a contract in which C is jointly interested, and if the particular objection is not taken by demurrer or answer on the part of B it cannot be used on the trial to defeat the action; but in a prior suit by B if A should set up the same claim by way of off-set, B need not raise the objection of the non-joinder of C in his reply but may prove it on the trial in defeat of the off-set.

A defect of jurisdiction may be shown at any time and wherever it appears it is fatal to the action. And courts of inferior and limited jurisdiction must show it affirmatively, on their proceedings.

That the complaint does not state facts sufficient to constitute a cause of action is also fatal, whether the objection be taken in the pleadings or not, and it is not held to be waived.[1] The defendant may appeal from the judgment, and the same will be reversed for the defect of the pleading.[2] Though it was said in Carley *v.* Wilkins,[3] that where the defendant sought a new trial on *the evidence*, and did not appeal on the ground of the insufficiency of the complaint, there, evidence showing a good cause of action under a bad complaint, will sustain the judg-

[1] Luddington v. Tefft, 10 Barb. S. C. R. 44.

[2] Rayner *v.* Clark, 7 Barb. 581.

[3] 6 Id. 557.

ment. The correctness of this within the case of Rayner *v.* Clark may be questioned.

SECTION VI.

FRIVOLOUS DEMURRER AND PRACTICE THEREON.

THE Code as originally passed contained no provision authorizing judgment on a summary application in case a demurrer was frivolous. Section 247 of the amendments of 1849, is as follows:—

"If a demurrer, answer, or reply, be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of court, for judgment thereon, and judgment may be given accordingly."

It will not be necessary or useful here to notice the various decisions made prior to this amendment as affecting and regulating the practice under the original Code.[1] The amendment itself prescribes specifically and definitely the practice, and points out the remedy. The most serious question likely to arise under the section in respect to the demurrer will probably be, *what is a frivolous demurrer?* By a frivolous demurrer under the old practice was meant

[1] 1 Code R. 25, 49, 84. 3 How. Pr. R. 280, 289.

a demurrer interposed merely for delay, and which has no color or foundation.[1] There seems, however, to have been a distinction recognized between such a demurrer interposed in bad faith, and one which might perhaps have been put in with the hope of its proving successful, although with no expectation of its deciding the cause. In the former case, that is, when not put in in good faith, the court would not grant the defendant leave even on an affidavit of merits to plead over. But in the latter case it seems on such an affidavit he might.[2] This same distinction seems to be recognized by the Code. If it appear *that the demurrer was interposed in good faith* the court in its discretion may allow the party to answer.[3] Perhaps, therefore, the definition above, that a frivolous demurrer is one interposed *merely for delay* is too narrow, for a demurrer under the present, as under the old practice, may be entirely frivolous, that is without any color or foundation, and yet have been put in not for delay alone, but with some expectation of its success. In such case it would be very properly overruled on summary application under section 247, but the defendant on the proper affidavit should be allowed to answer. This was intimated in the case of Appleby *v.* Elkins[4] where, on ruling a demurrer to be frivolous, judgment was directed for defendants, and there being no affidavit of merits, leave to answer was refused;*

[1] Grah. Pr. 750.

[2] 10 Wend. 623.

[3] Am. Code. § 172. Enos *v.* Thomas, 4 How. Pr. R. 48.

[4] 2 Sand. 673.

* The complaint in that case was as follows :

"That the defendant on the first of August, 1849, made his pro-

an answer in such case was allowed in Enos & others *v.* Thomas & others, at special term.[1]

It was held in a case under the Code, that where a complaint by an endorser of a promissory note alleged that the plaintiff was the "lawful holder" of the note, and the defendant demurred, alleging for cause that it did not appear from the complaint that the plaintiff was the "owner" of the note, that such a demurrer could not be treated as frivolous.[2] But a demurrer will be regarded as frivolous if it appears to be taken merely for delay, or if the grounds of the demurrer are clearly untenable. Thus it was held at special term in Howell *v.* Frazer & others[3] that if a party mistake his remedy and demur when the objection should be taken by motion to make the pleading more certain, the demurrer is frivolous. In that case the defendant demurred because the complaint alleged that the plaintiff *believed, &c.*, instead of alleging *on his information*

missory note as follows (setting forth a copy) and delivered the same to Noah Ridley, (the payee) who thereupon endorsed the same to the plaintiff. That the said defendant did not pay the same when it became due, and that the defendant is indebted to the plaintiff upon the same note in the sum of $160 besides interest."

The defendant demurred for the following causes.

1. That the complaint does not show that the plaintiff is the lawful holder of the note on which the action is brought. 2. It is not averred that the said note is due. 3. The complaint does not state facts sufficient to constitute a cause of action.

[1] 4 How.Pr. R. 48.

[2] Beech *v.* Gallup, 2 Code R. 66.

[3] 6 How. Pr. R. 221. 1 C. R., N. S. 271.

and belief. It was remarked by JUSTICE MITCHELL, "If a pleading is correct in substance, but not in form, the remedy is not by demurrer, but by a motion to make it more certain or definite, or by some other way than demurrer. The Code never intended that judgment should be given against a party who has merits for a mere matter of form."

Nor will a demurrer be overruled as frivolous in a case where the defendant demurs and answers to the same cause of action. In such case the answer cannot be treated as a nullity, and judgment rendered for plaintiff because of the frivolousness of the demurrer. The proper course it seems is to move to strike out the demurrer or the answer.[1]

It will be impossible to enumerate the cases in which a demurrer may be deemed frivolous; nor indeed is it an easy matter to lay down any general rule that will reach every variety of case. A frivolous demurrer is one which without argument and at first glance must be pronounced bad. The grounds thereof should be *clearly untenable*;[2] and if the matter is fairly susceptible of argument it should not be treated as a frivolous demurrer. The mere argument of counsel, in opposition, is not sufficient; there should be some color or semblance of reality.[3] The dividing line, however, between a real and a frivolous demurrer, is not by any means clearly defined, and it will in general rest much in the discretion of the court whether to entertain the motion at chambers

[1] 5 How. Pr. R. 5.

[2] Neefus *v.* Kloppenburgh, 2 Code R. 276.

[3] Grah. Pr. 759.

and on five days' notice, or whether to put the party to his motion, on regular notice, at the circuit court or special term. This seems now to be really the only practical point of distinction between them; for as all issues of law (unless otherwise ordered) are now by the Code required to be tried at special term or circuit court, and have preference on the calendar,[1] there will not in general be much delay in getting a decision. Where there are doubts therefore, as to the frivolousness of the demurrer it will be always better to notice it in the regular way for the first circuit or special term in the county where the trial is to be had.[2]

A motion for judgment, on the ground of the frivolousness of the demurrer, may be made before the expiration of the time to amend, and if an amendment be made, so that the demurrer is no longer frivolous the motion will be denied without costs.[3]

[1] Am. Code, § 255.

[2] See post, chap. 8, sec. 2, as to how and where an issue of law is to be tried.

[3] Curril *v.* Baldwin, 4 Sand. 690.

CHAPTER VIII.

OF THE ISSUE.

THE parties having made their various allegations, and an issue being formed presenting the points in controversy in the suit, the next consideration will be as to the mode and manner of disposing of this issue, and as to the legal effect of the matters pleaded, and how they are to be used upon the trial. A full consideration of this subject would involve to some extent the subject of practice in courts of law. Keeping in view the object of this work, which has been simply to treat upon the pleadings in an action, as a distinct branch from the practice, I shall not attempt to comment at length upon the mode and manner of conducting the trial of an issue, either of law or of fact, but will barely glance at it for the purpose of enabling the reader more clearly to comprehend the nature of some questions of pleading, growing out of and connected with the issue.

The present chapter will be divided into the following sections:

1. Issues of law and of fact.
2. How and where issue to be tried.

3. Effect of the pleadings, and what facts are deemed admitted on the trial.
4. Pleadings, how to be construed.
5. Special rules applicable to pleadings.

SECTION I.

ISSUES OF LAW AND OF FACT.

The definition and nature of an issue have not been materially changed by the Code. Blackstone defines an issue to be: "When in the course of pleading they come to a point, which is affirmed on one side and denied on the other, they are then said to be at issue."[1] A broader definition, and one more conformable to the theory of the Code, is given by another writer thus: "An issue is, when both parties join upon somewhat that they refer unto a trial, to make an end of the suit."[2] The issue is very accurately defined by Stephen in his treatise on pleading to be: "Some question, either of fact or law, disputed between the parties, and mutually proposed and accepted by them, as the subject for decision."[3]

The Code defines an issue substantially in the same terms:

[1] 3 Black Com. 313.
[2] Finch Law, 336.
[3] Steph. on Pl. 124.

§ 248. Issues arise upon the pleadings, when a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

1. Of law; and
2. Of fact.

It is obvious that the object of all pleading is the production of an issue—that which, in the language of the Code, is "maintained by one party and controverted by the other." The controversy between the parties is to be narrowed down to the exact points in dispute, and these are to be referred to the proper tribunal for decision. The pleading is the record of these allegations to enable the tribunal before which the issue is tried to understand and determine the precise points in controversy. There is no difference in this respect between pleadings at law and in equity. Both are designed "to bring the matters in controversy between the parties who are interested therein, before the tribunal by which they are to be adjudicated."[1]

Under the Code, as at common law, issues are of two kinds, of law and of fact. They are thus defined:

§ 249. An issue of law arises

1. Upon a demurrer to the complaint, answer, or reply, or to some part thereof.

§ 250. An issue of fact arises

1. Upon a material allegation in the complaint, controverted by the answer; or,

2. Upon new matter in the answer, controverted by the reply; or,

[1] Story, Eq. Pl. § 1.

3. Upon new matter in the reply, except an issue of law is joined thereon.

It will thus be seen that an issue of law arises wholly on a *demurrer*, that is, where the party taking such an objection, admits the allegations set forth in the pleading of the opposite party to be true, but claims that the allegations do not disclose such a case on the merits as constitutes a good cause of action or defence. This issue so raised is wholly a question of law to be tried by the court. An issue of fact, on the contrary, arises on the denial by either party of the allegations in a pleading. The allegation denied or controverted, in order to produce such an issue as is contemplated by the Code, must be "a *material* allegation,"[1] that is, as I understand it, not an allegation which, if disproved, would be entirely *decisive* of the whole issue, but an allegation *material* to the specific relief sought, whether in the enforcement or protection of a right, or the redress or prevention of a wrong,[2] and material to the judgment which the court is to pronounce upon proof of the facts, or such of them as entitle the party to judgment. This issue so raised is triable by a jury, or in certain cases, by the court sitting as a jury, or by referees.

The Code provides further: that

[1] § 250 Code, Sub 1.—The second and third subdivisions of the section, defining how an issue is raised on "new matter" in the answer or reply, omits the word "material." It cannot be doubted, however, that the "new matter" spoken of is such only as is "material" to the nature of the relief sought, or the defence interposed. See ante.

[2] Code, Pro. § 2.

"Issues, both of law and of fact, may arise upon *different parts of* the pleadings in the same action. In such cases, the issues of law must be first tried, unless the court otherwise direct."[1]

The words in italics in the above section were not in the original Code, and were inserted by the amendments of 1849. It having been held in the case of Manchester *v.* Storrs,[2] that there could not be a demurrer to one cause of action, and an answer to another, a remedy was provided for this inconvenience in the amendments of the same year, by inserting in section 145 that a demurrer might be taken "to the whole complaint, or to any of the alleged causes of action stated therein." And, also, in section 151, "That the defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue."

It was said in a case in the N. Y. Superior Court[3] that the defendant may demur and answer to the same cause of action; in other words that an issue of law and of fact might arise at the same time on the same allegation. This question has been repeatedly, since the above amendments of 1849, decided otherwise in the Supreme Court, and it is believed the practice is now well settled that a party cannot demur and answer the same pleading.[4] In Spelman *v.* Weider, JUSTICE WILLARD, in such a case refused

[1] Code, § 251.

[2] 3 How. Pr. 410.

[3] The People *v.* Meyer, 2 C. R. 49, and see also on the same point, Gilbert *v.* Davies, id. 50.

[4] 4 How. 373, 3 Code R. 59, 5 How. 5. Id. 206.

to treat the answer as a nullity and to render judgment on the demurrer as frivolous, holding the proper remedy of the party to be to move to strike out one of the pleadings, and to compel the opposite party to elect by which issue he would abide.[1]

If it be thus necessary that a separate issue of law or of fact be raised on each distinct cause of action or of defence, and that the two cannot be interposed to the same allegations, so too must an issue of law or of fact be joined upon an *entire* cause of action or defence. Mere statements and allegations which do not of themselves constitute one entire ground of action or defence, cannot be demurred to. No issue is formed by such a demurrer capable of trial, and the party aggrieved may move to strike it out.[2]

Issue must be single.—It is laid down in the books on pleading that an issue should be *single, certain* and *material.*[3] By *single* is not meant that only one point is to be presented for trial, or one question to decide the action. Even under the old system of pleading at law, this was not the case.[4] It was found that some controversies might admit of many questions arising on the pleadings, or distinct issues, as for example where several distinct causes of action were united in the same declaration, or several pleas pleaded to the same claim. The determination of the whole matter in controversy necessarily required that

[1] 5 How. Pr. R. 5.

[2] 4 How. 413. 3 id. 410.

[3] Stephen Pl. 135. 1 Chit. Pl. 652.

[4] 3 Caines, 162. 1 Burr. 316. 8 Wend. 129. 2 John, 462. 3 Cow. 303. 6 id. 45.

all these several issues should be decided. Under the old common law pleadings it was said that in the case of several claims united in the same declaration the issues raised on each claim should all be decided, but that in case of a *single* claim the same consideration did not apply, for the decision of any one of the material issues that may arise upon it will be sufficient to dispose of the entire claim.[1] This doctrine is not entirely applicable to the Code, which provides that "the defendant may set forth as many defences as he shall have," &c. Thus, to a contract he may plead the statute of limitations, infancy, duress, &c., and raise several distinct issues the determination of one of which adversely to the defendant does not necessarily decide the action. All that is meant now by the rule, that the issue must be *single*, is that upon a single claim, as for damages, or the recovery of specific real or personal property, each matter of defence set forth shall in the language of the Code be "separately stated," and that each of such separate matters of defence to each *single claim* alleged shall present an issuable point, capable of being tried.

Must be certain. The issue was also required to be *certain*. By this is meant that the issue must be *particular* or *specific*, as opposed to undue generality. It was considered one of the essential qualities of the issue that it should be certain.[2] A material and traversable fact must in general be expressly stated, and cannot be inferred from other parts of the plead-

[1] Steph. on Pl. 131.

[2] Steph. on Pl. 133.

ing;[1] although, as we have seen, there are exceptions.[2] So too, certainty in the issue required a certain time and place to be stated to every material and traversable fact. This, however, is now mere matter of form, unless, perhaps, in those cases where time and place enter into the substance of the contract, and must be proved to sustain the action.[3] So too, the pleadings were required to specify quantity, quality, and value,[4] in order to effect this certainty in the issue, which the artificial rules of pleading at common law required. The certainty required in the pleadings was what was called certainty to a common intent,[5] that is what, in on a fair and reasonable construction, may be called certain without recurring to possible facts,[6] or, to adopt a former definition of the Code, the facts must be stated in such a manner as "to enable a person of common understanding to know what is intended."[7]

Must be material. But the essential point in the issue was, and under our new system of pleading still is, that it should be *material.* The pleadings are, therefore, required to state *material* and *issuable* facts. No allegations, except such as may be traversed, and as may properly be put in issue and tried can be inserted. Or, if such allegations are inserted, they may be entirely disregarded. A neglect to answer them cannot in any way prejudice the other party; for it is only every *material* alle-

[1] 7 John. 75.
[2] Ante.
[3] Ante, pages 254 to 257.
[4] Steph. on Pl. 295.
[5] 4 Barb. 596.
[6] 9 John. 314, 19 id. 349.

gation in the complaint, &c., which is to be taken as true unless denied.

A demurrer admits only the facts stated in the complaint which are material to the action, relevant and well pleaded, and does not admit conclusions or inferences of law.[1] In analogy with this rule it has been laid down that such conclusions and inferences, as well as all other matter not material to the issue, should not be controverted or denied by the pleader;[2] but that they should be entirely disregarded unless a motion is made to strike them out as irrelevant or redundant.[3]

An immaterial issue, as contradistinguished from a *material* issue, is defined to be an issue "unfit to decide the action,"[4] one that "will not determine the merits of the cause,"[5] "a point not decisive of the right of the case."[6]

JUDGE SELDEN thinks this rule cannot be applied to an action for equitable relief, but is merely an incident of the mode of trial in common law actions.[7] A "material issue" in the common law sense he defines an issue decisive of the whole case; in an equity sense it is an issue upon a fact which has *some* bearing upon the equity sought to be established. It is unnecessary to repeat here what was said in the first chapter of this work[8] relative to this distinction,—a distinction which it is believed cannot be sustained

[1] 9 Barb. S. C. R. 301. Story Eq. Pl. 452. [3] Ante.
[2] See Bedell *v.* Stickels, 4 How. Pr. 432.
[4] Steph. on Pl. 129.
[5] 1 Chit. Pl. 692. [6] Gould Pl. ch. 6. § 27.
[7] Wooden *v.* Waffle, 6 Pr. R. 151. [8] Ante.

in practice or upon principle. If the facts spoken of by the learned justice, as having "*some* bearing upon the equity sought to be established" are not mere matters of evidence but such as are, or may become, *material* to the particular relief asked, then they are such facts as can properly be put in issue and tried. And although the determination of one of such facts may not be decisive of the whole case, yet if such determination will have an essential bearing upon the relief demanded and will materially affect the judgment to be rendered, an issue joined upon such fact cannot certainly be called immaterial.

In Stafford *v.* Mayor of Albany,[1] the Supreme Court of this state defined an immaterial issue to be "where that which is *materially alleged* by the pleadings is not traversed, but an issue is taken on such a point as will not determine the merits of the action." The court can render no judgment on a verdict on such an issue unless indeed in those cases where the defect is not in substance but merely in the form or manner of statement, and which is cured by the verdict.[2]

The old practice at common law was, where an immaterial issue was formed, the court ordered the parties to plead anew, for the purpose of obtaining a better issue. This is called a repleader.[3] This, however, was only done where it appeared that the matter, if well pleaded, would be a good defence, and not in those cases where it appeared that such matter could never be made good by any sort of plea.[4] If the

[1] 6 John. 1.
[2] And see post. sec. v. of this chapter.
[3] Bouv. Law Dict. title, *Repleader*.
[4] 2 Ld. Rogan, 924, 1 Burr. 301.

defect was in the form or manner of statement, and issue is taken in it, and such an immaterial issue is tried, there a repleader is proper: but, if defective in substance, and the court can see that in any way of putting it the party can have no merits, and the issue joined thereon be found for him, the court will not grant a repleader, but give judgment notwithstanding the verdict.[1] A repleader is always awarded on the form and manner of pleadings, and not on the merits.[2]

How applicable to the Code. These principles are not entirely inapplicable to pleadings and practice under the Code. The question may arise, how is an immaterial issue to be disposed of? Doubtless, the court, as under the old practice, if the defect be not in the form or manner of the statement, but such as to render it apparent that no manner of setting forth the matter will avail to raise a material issue, may render judgment, and even if an issue be joined and found for the defendant, the court may render judgment against him notwithstanding the verdict. Where the complaint does not state facts sufficient to constitute a cause of action, and a general or specific denial is interposed, the issue is clearly immaterial. Such an issue is incapable of being tried. The plaintiff can give no evidence of any material fact not alleged in his complaint; in other words, he cannot prove a good cause of action under a complaint containing none.[3] The Code itself provides

[1] Otis *v.* Hitchcock, 6 Wend. 433.

[2] Bellows *v.* Shannon, 2 Hill, 86.

[3] Bristol *v.* Rensselaer Rail Road Co., 9 Barb. S. C. R. 159.

that a neglect to demur to such a complaint does not remedy the defect;[1] a verdict or report of referees and judgment will not cure such an immaterial issue.[2] The defendant might move in arrest of judgment, or, failing to do that, appeal from the judgment.[3] It has, however, been held in a late case,[4] that where a good cause of action has been established by proof, without objection under such an issue, there the defendant lost his right on a case made to review the evidence and on motion for a new trial, to raise an objection to the sufficiency of the complaint. In that case, a report of referees which appeared to be sustained by evidence, was allowed to stand notwithstanding the complaint contained no cause of action. The court held that the defendant should have objected on the trial to the plaintiff's proving any material fact not contained in the pleading, and this would have enabled the referee to dispose of the question at once, and if necessary, permit the plaintiff to apply for leave to amend.

It is presumed that under the present system, the practice of granting a repleader in cases of an immaterial issue no longer exists. Where the issue is fatally defective and cannot be cured by amendment, the court, as under the old system, can effectually dispose of the question. In cases, where, under the old practice, a repleader would have been proper after verdict, for some defective manner of state-

[1] § 148 Am. Code.

[2] 9 Barb. S. C. R. 159.

[3] Rayner *v.* Clark, 7 Barb. S. C. R. 581.

[4] Carley *v.* Wilkins, 6 Barb. S. C. R. 557.

ment, the same thing can now be accomplished by amendment,[1] the Code providing for amendments before or after judgment, by inserting other allegations material to the case, or by conforming the pleading or proceeding to the facts proved.[2]

SECTION II.

ISSUES HOW AND WHERE TRIED.

It remains briefly to consider how and where the issues in an action are to be tried, and first:—

What is a trial. A trial is defined by the Code to be "the judicial examination of the issues between the parties, whether they be issues of law or of fact."[3]

There are three kinds of trial, namely, trial by the court, trial by jury, and trial by referees. The commissioners of the Code in their desire to produce uniformity in the mode of trial, as well as in the other proceedings, and in the pleadings in all cases, provided that all issues, whether of law or of fact, should be tried in the first instance before a single judge, and judgment entered on the direction of a single judge. The amendments to the Code of 1851 destroyed this uniformity of trial, by providing that issues of fact must be tried by a single judge, (except

[1] Corning *v.* Corning, 1 C. R., N. S. 351.

[2] Am. Code, § 173, 7 Barb. S. C. R. 13.

[3] Am. Code, § 252, see Dodge *v.* Curry, 4 How. 123.

in cases of reference,) and issues of law at a general term, unless the court order the trial to be had at a special term.[1]

This amendment was found to result in much vexation to suitors and unnecessary delay. It was provided by section 251, that where issues of law and of fact arose in the same action, the issues of law must be first tried, unless the court otherwise direct.

Under this section it was held in the Superior Court, in Warner *v.* Wigers,[2] that an issue of fact might, if no objection was made by the adverse party, be brought on for trial while an issue of law in the same action was undisposed of; and that a previous order was not necessary on the subject. The practice in that court is, that whenever a cause in which issues of law and of fact are pending, is moved on the trial calendar, the court will determine which issues are to be tried first. This of course rendered it necessary to go the general term in the first instance, to dispose of the issues of law. Still it was found convenient, if not absolutely necessary, in most cases, to dispose first of the issues of law, though it has been held that no judgment can be entered on the decision of a demurrer, while an issue of fact is not disposed of.[3] The delay attending the trial of a demurrer at general term, the decision of the issues of fact, in the cause, if there were any, being in the meantime suspended, rendered it desirable, if no other reason existed, to restore the former practice.

[1] Am. Code, § 255.

[2] 2 Sand. S. C. R. 635.

[3] 6 How. Pr. R. 114.

Accordingly, it is provided by the late amendments.

"All issues of fact, triable by a jury, or by the court, must be tried before a single judge. Issues of fact in the Supreme Court, must be tried at a Circuit Court when the trial is by jury, otherwise at a Circuit Court or special term, as the court may by its rules prescribe. Issues of law must be tried at a Circuit Court or special term, and shall, unless the court otherwise direct, have preference on the calendar."[1]

This, it is presumed, is intended to repeal so much of section 257,[2] as is inconsistent with it. By that section issues of fact were to be tried first, unless the court should otherwise direct; by the present amendment, issues of law have preference, unless otherwise ordered by the court.

It has been remarked that the Code provides three modes of trial—by jury, by the court, and by referees. An issue of law it has been seen is to be tried at a Circuit Court or special term, and by the court. It is not a proper subject for a trial by jury. It may, however, by consent of parties be referred.[3] Issues of fact are to be tried in one of the three ways above mentioned.

It has been a question how far the Code has really effected a uniformity of trial of issues of fact in all cases, and whether a distinction is not still recognized between the trial of cases for legal, and those for equitable relief. So far as the trial by the court or

[1] § 255 as amended 1852.

[2] Am. Code 1849.

[3] Am. Code, § 270.

by referees is concerned, the mode of trial is equally applicable to both classes of cases. Before the Code, it was provided by the new constitution, that "testimony in equity cases shall be taken in like manner as in cases at law,"[1] that is orally, in open court, or before a referee when the issue was referred. So far, therefore, as issues of law are concerned, and trials of issues of fact before the court, or before referees, there is nothing to prevent the attainment of a perfect uniformity in the mode of trial, as well as in the other proceedings in the action.

But the question has been raised, and it has been held, that there is a difference in respect to trials of issues of fact before a jury, and that a uniform mode of trial has not really been provided by the Code.[2] If this be so, it is certainly contrary to what the commissioners intended. In their remarks on the title relative to "Trial and judgment in civil actions," they state very explicitly, that a main object has been to attain this uniformity of trial, and further express the opinion, that there is nothing either in the nature of equity cases, the number and variety of the questions raised in them, or the form of the pleadings, which renders them unfitted to be tried by a jury.[3] The design seem to have been, however, to limit the trial and decision of equity cases, or perhaps more properly speaking, of all cases other than those which the Constitution expressly declared should

[1] Art. 6, § 10.

[2] 4 How. Pr. R. 423, 3 C. R. 49, 5 How. 216, Crary v. Goodman, 9 Barb. 663, Cochran v. Webb, 4 Sand. 653.

[3] First Rep. Com. pp. 176 to 181.

be triable by jury,[1] mainly to the court and to referees. Accordingly, they provided first for the trial by jury of that class of cases indicated by the Constitution, namely, for the recovery of money damages, or specific real and personal property. The section as amended in 1849, to include divorce for adultery, is as follows:—

"An issue of law must be tried by the court, unless it be referred, as provided in sections 270 and 271. An issue of fact, in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract, on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in section 266, or a reference be ordered as provided in sections 270 and 271."[2]

Section 270, referred to, provides for the reference of any issue by consent of parties. Section 271 for a reference 1st, where the trial shall require the examination of a long account; 2d, where the taking of an account, or the proof of any fact is necessary before judgment, or for carrying the judgment into

[1] Art. 1, § 2, Constitution provides "The trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever. But a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law."

The cases in which it has been heretofore used are cases at common law, claiming compensation in damages, or recovery of the specific real or personal property. Except that a reference might be ordered, when the trial would require the examination of a long account.

[2] Am. Code, § 253.

effect; and 3d, where a question of fact arises in the action otherwise than upon the pleadings.

The "specific real or personal property" mentioned in the above section as a claim properly triable by jury, has reference only to actions for the recovery of chattels, equivalent to the old action of replevin, or the recovery of the possession of real estate, as in the action of ejectment, and does not relate to claims in equity.[1] The Code, therefore, gives the party a right to his trial by jury only in those cases where it was previously guaranteed by the Constitution, and in the case of a divorce from marriage on the ground of adultery. The revisers however, evidently contemplated extending, rather than restricting, the trial by jury, and of making it equally applicable to all classes of cases, whether legal or equitable. Accordingly the court is clothed with power to order the whole or a part of any issue to be tried by jury.

Section 254. Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury; or may refer it as provided in section 270 and 271.

If any such distinction therefore exists, as to the mode of trial, or the forum before which the trial shall be had, between claims for legal and equitable relief, as is supposed by JUSTICE MASON in Hill *v.* McCarty[2] and has been more recently held in Crary *v.* Goodman[3] it is a distinction resting entirely with

[1] 4 How. Pr. R. 423.

[2] 3 Code, Rep. 49.

[3] 9 Barb. S. C. R. 663.

the court to preserve or abolish.[1] The court may order "the whole issue" (in every case as we understand it,) to be tried by a jury, and certainly, in such case, the mode of trial will be uniform, as the rest of the proceedings, and the pleadings are required to be, in all classes of cases. The Constitution requires certain cases to be tried by a jury—that is cases at common law. The legislature could not repeal this provision. The Code without expressly requiring equity cases to be tried the same way, except in an action for divorce for adultery, provides that they *may* be so tried in the discretion of the court. In order to carry this object into effect the court by its general rules provides that where either party to such an issue desires a trial by jury he may within ten days after issue joined give notice of a motion to settle the issues and such issues are to be settled in the form prescribed in § 72 of the Code.[2]

I do not intend to speak particularly of the mode and manner of framing such an issue, or generally of bringing on the issue for trial, as this more properly belongs to the subject of "practice," which is not within the design of this work. An issue is considered as joined for all purposes, except amendment, immediately on the service of a reply, or an answer which sets up no counterclaim.[3] Either party may serve notice of trial immediately and before the time to amend expires, but he does so at his peril, and without prejudice to the right of the opposite

[1] Per PARKER, J. 6 How. Pr. R. 271.

[2] Rules Sup. Court 74.

[3] Cusson v. Whallon, 1 C. R., N. S. 28.

party to amend.[1] If the cause be brought on for trial, and judgment be obtained before the expiration of the time to amend, the party having the right to amend may do so, and the judgment will be set aside.[2] Though, if, in such case, the plaintiff does not amend, the judgment it seems is regular. The right to amend is not *per se* a stay of proceedings.[3]

Issues, where tried.—The Code has made specific provisions respecting the place of the trial of civil actions, and under these provisions a variety of decisions have been made which respect mainly the practice of the court to change the *venue* as it was called, or place of trial.

At common law, the venue was either *local* or *transitory*. If local, it must be laid in the county, and the cause tried in the county where the cause of action arose. If transitory, it could be laid in any county, and the cause of action tried in such county, subject, however, to its being changed by the court in some cases, if not laid in the county where the cause of action really arose.[4] It is perhaps unnecessary under our system, to enquire in what cases at common law or under the Revised Statutes of New York,[5] an action was said to be *local*, and in what cases *transitory*. A party is not at liberty now to lay his *venue* in any county he may choose to designate in the

[1] Washburn *v.* Herrick, 4 How. Pr. R. 15.

[2] Morgan *v.* Leland, 1 Code. R. 123.

[3] 1 C. R., N. S. 28.

[4] 1 Chit. Pl. 267, 2 Saund. 74.

[5] See 2 R. S. (3rd Ed.) page 506.

complaint, even in a transitory action, except in the single case of all the parties being non-residents.[1]

The following actions must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in the cases provided by statute.

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
2. For the partition of real property.
3. For the foreclosure of a mortgage of real property.
4. For the recovery of personal property distrained for any cause.[2]

The following actions must be tried in the county where the cause, or some part thereof, arose, subject to like power of the court, to change the place of trial in the cases provided by statute.

1. For the recovery of a penalty or forfeiture imposed by statute; except that when it is imposed for an offence committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offence was committed.
2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person, who, by his command or in his aid, shall do anything touching the duties of such officer.[3]

[1] Am. Code, § 125.
[2] Am. Code, § 124.
[3] Am. Code, § 123.

In all other cases, the action shall be tried in the county in which the parties, or any of them shall reside at the commencement of the action; or, of none of the parties shall reside in the state, the same may be tried in any county which the plaintiff shall designate in his complaint; subject, however, to the power of the court to change the place of trial in the cases provided by statute.'.

The first two sections above quoted, are similar to the provisions of the Revised Statues relative to the venue in civil actions.[2] The last section may be said to be new, though similar to the 46th section of the Judiciary act of 1847, requiring the venue to be laid in a county where one of the parties resided, or an adjoining county, and which section was subsequently, the same year, repealed.

It is said by JUSTICE SILL, in Lynch *v.* Mosher,[3] that the power of the Supreme Court to change the place of trial of transitory actions, for the convenience of the witnesses and parties, was originally exercised as an incident to its general jurisdiction, and that the exercise of such power was not the subject at statutory provision until the Revised Statutes of 1830. The Code does not define the cases in which the place of trial shall be changed, but leaves this question as it stood under former statutes. Its only effect is to take from the court the exercise of this power as a part of its general jurisdiction, and confine it to "cases provided by statute," and the right to exer-

[1] Am. Code, § 124.

[2] 2 R. S. (3d Ed.) 506.

[3] 4 How. Pr. R. 86, 2 Code R. 54.

cise this power is now derived from the Revised Statues, and the 49th section of the Judiciary act of 1847.[1]

The Revised Statutes provided that transitory actions should be tried in the county where the venue was laid, (that is in any county where the plaintiff chose to lay the venue,) "unless the court shall deem it necessary for the convenience of parties and their witnesses, or for the purposes of a fair and impartial trial, to order such issues to be tried in some other county," and again:—

"And the court shall have power to change the venue in any of the actions specified in this section (local as well as transitory), when it shall appear that a fair and impartial trial cannot be had in the county in which such venue is laid."[2]

The 49th section of the Judiciary Act of 1847, referred to, provides that "the Supreme Court organized by this Act, shall have power to order any issue of fact, joined in any suit or proceeding at law or in equity, whether joined in the Supreme Court or any County Court, or other court, to be tried in any other county, *on good cause shown therefor*, and on such terms and under such rules and regulations as said Supreme Court shall prescribe."

In the case of Lynch *v.* Mosher, cited supra, it was not decided whether both these statutes were still in force under the Code, or whether the latter

[1] 4 How. Pr. R. 86, 2 Code R. 54.

[2] 2 R. S. (3d Ed.) 506, § 2.

was to be regarded as having superseded the former. It is, however, evident from the phraseology, that § 49 of the Judiciary Act was not intended to restrict or narrow down the causes for which the place of trial would be changed in any action. On the contrary, the words "for good cause shown," seem to confer a still broader discretion on the courts than they then possessed. The sections, however, are in substance the same, and, perhaps, as is well remarked by JUSTICE SILL, the latter Act may be regarded as a substitute for, or a revision of, the former.[1] Since that decision, however, the Legislature has specified the cases in which the court may change the place of trial, by an amendment to the 126th section of the Code, as follows:

"The court may change the place of trial in the following cases:

"1st. When the county designated for that purpose in the complaint is not the proper county.

"2d. When there is reason to believe that an impartial trial cannot be had therein.

"3d. When the convenience of witnesses and the ends of justice would be promoted by the change."

By the same section, if the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demand in writing that the trial be had in the proper county.

[1] See also 4 How. Pr. R. 187.

It was held under this section, before it was amended in 1851, that there was no statute under which a court could order an issue of law to be tried out of the county originally specified in the complaint; and such issue must, therefore, be tried in the Judicial District.[1] It is believed the amendments of 1851 confer this power upon the court, although it cannot certainly be one that will be frequently called into action. Whether these amendments, in specifying the causes for which the place of trial may be changed, are designed to repeal or supersede the provisions of the Revised Statutes above referred to, and the 49th section of the Judiciary Act, has not, to the author's knowledge, been yet adjudicated. The question is, perhaps, of not much practical importance. Doubtless the courts will construe the 3d subdivision of § 126, "*When the convenience of witnesses and the ends of justice would be promoted by the change*," as liberally as the language "*on good cause shown*," contained in § 49 of the Judiciary Act.

The practice upon the application to change the place of trial and proceedings thereon, will not be discussed here. A variety of decisions have been made on this subject under these sections of the Code, most of which are referred to in the note below.*

[1] Gould *v.* Chapin, 4 How. Pr. R. 188.

* NOTE. 1 Code R. 82. Warner *v.* Kenny, id. 96. Miller *v.* Hall, id. 113, 3 How. Pr. R. 325. Beardsley *v.* Dickinson, 4 Pr. R. 81. Lynch *v.* Mosher, 4 Pr. R. 86, 2 C. R. 54. Clark *v.* Pettibone, 2 C. R. 78. Milligan *v.* Brophy, 2 C. R. 118. Gould *v.* Chapin, 2 C. R. 107, 4 Pr. R. 185. Myers *v.* Fector, 2 C. R. 147, 4 Pr.

It was held in the case of Warner *v.* Kenny,[1] that a judgment on failure to answer, was a trial within the meaning of the Code, and that the application for judgment must be made in the county designated in the complaint as the place of trial. The Supreme Court, since that case, by its general rules permits an application for judgment on default to be made in any county of the district, embracing the county in which the action is triable, or in an adjoining county, such application to be made at any special term, and also at a Circuit Court in the county where the action is triable. But when a reference or writ of inquiry shall be ordered, the same shall be executed in the county in which the action is triable.[2] This seems to be regarded as simply a question of practice, within the power of the Supreme Court to change, alter, or modify by its general rules, and I believe it has not been doubted that it is competent for the court to establish such a rule, notwithstanding the decision of Warner *v.* Kenny, above referred to.

A trial, according to MR. JUSTICE GRIDLEY, is a final

R. 240. Schenck *v.* M'Kie, 3 C. R. 24. Mixer *v.* M'Khun, 3 C. R. 106, 4 Pr. 409. Hasbrouck *v.* M'Adam, 3 C. R. 39, 4 Pr. R. 342. People *v.* Wright, 3 C. R. 75, 5 Pr. R. 23. Mairs *v.* Remsen, 3 C. R. 138. Northrop *v.* Van Dusen, id. 140. Hartman *v.* Spencer, 5 Pr. R. 135. Moore *v.* Gardner, id. 243. Johnson *v.* Bryan, 1 C. R., N. S. 46. Jordan *v.* Garrison, 6 How. Pr. R. 6. Vermont R. R. Co. *v.* Northern R. R. Co. id. 106. Mason *v.* Brown, id. 481.

[1] 3 How, Pr. R. 323. 1 Code R. 96. Also an anonymous case, 1 Code R. 82.

[2] 91 Rule Sup. Court.

disposition of the cause, and does not require an *actual* "judicial examination of the issues." Therefore, when the plaintiff fails to appear on the calling of a cause, and the complaint is dismissed, it is equivalent to a "trial."[1] In analogy to this decision, it would seem, that a motion by a defendant for a dismissal of the complaint pursuant to Rule 23, where the plaintiff fails to bring an issue of fact to trial, must be made in the county where the action is triable.

The examination of an issue of law as well as of fact, is also a "trial." It is so expressly defined by the code:[2]

§ 252. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

This section was struck out by the amendments of 1851: issues of law were made triable at the General Term, and of course the provisions of the Code respecting the place of trial, had no farther reference to such issues. But the section has been restored by the late amendments, and the question occurs, whether the provisions of the Code respecting the place of trial are to be *literally* construed as intending to embrace both kinds of issues. In analogy to other proceedings under the Code, and with reference to the general uniformity of the system, I should not hesitate, if this were an original question, to answer it in the affirmative. It has, however, been otherwise decided. In the case of Gould *v.* Chapin[3] at the Monroe Special

[1] Dodd *v.* Curry, 4 How. 123.

[2] Original Code, § 207.

[3] 4 Pr. R. 188.

Term, in December, 1849, it was said that there is no statute under which courts could order an issue of law to be tried out of the county specified in the complaint; and the cause must for this purpose be triable in the *district where the venue is.* This dictum was followed by MR. JUSTICE WILLARD at the Fulton Special Term, in a case arising before the amendments of 1851,[1] and which directly involved the question. That able jurist, whose opinions in every case are certainly entitled to the highest respect, held that title 4 of part second of the Code, relative to the place of trial of civil actions, related exclusively to *issues of fact*, notwithstanding the definition of the Code that the determination of an issue of law is also a "trial." He was of the opinion, that the argument of a demurrer might be brought on at any special term in the district, or a county in another district adjoining the county mentioned in the complaint. The author is not aware that this practice is pursued in any district other than the 4th, or that it has received the sanction of any other judge. In Bently *v.* Jones,[2] it was held that the decision upon a demurrer was not an *order*, but a *judgment.* This was a decision at General Term.[3] The same doctrine was held at the General Term in the 4th district, in the case of Mitchell *v.* Weed.[4] And this, too, where the demurrer was

[1] Ward *v.* Davis, 6 Pr. R. 274.

[2] 4 How. Pr. R. 335.

[3] See also King *v.* Stafford, 5 How. Pr. R. 30; and Wood *v.* Lambert, 3 Sand. 724.

[4] 6 How. Pr. R. 127; S. C. 5 How. Pr. R. 30; see also 6 How. Pr. R. 21.

overruled by a judge at Chambers as frivolous. In Warner *v.* Kenny,[1] it was held that the mere rendering of judgment in case of default, where no issue at all was joined, was a "trial" within the meaning of the Code sufficient to fix the place where such judgment was to be rendered. These decisions, though not upon the precise question raised and decided in Ward *v.* Davis, supra, may be regarded in some respects as conflicting with the decision in that case. The ruling of Judge Willard in Ward *v.* Davis, that the "place of trial" spoken of in the Code, relates exclusively to the trial of *issues of fact*, cannot be sustained without overruling Judge Parker in Warner *v.* Kenny, that judgment must be rendered in the county specified for that purpose where there is no issue at all either of law or fact. On the whole, the more correct and safe practice seems to be, since the late amendments have restored section 252 of the Code defining what a trial is, to consider the "place of trial" as equally applicable to the decision of issues of law and of fact. These issues should, therefore, be brought to trial at a Circuit Court or Special Term in the county designated in the complaint, unless the place of trial be changed by order of the court. Even an application for judgment on a frivolous demurrer to a judge at Chambers should also be made in the county where the action is triable, within the spirit of the decisions in Rae *v.* Washington Mutual Ins. Co.,[2] Dodd *v.* Curry,[3] and King *v.* Stafford.[4]

[1] 1 C. R. 96.

[2] 6 How. Pr. R. 21. [3] 4 How. Pr. R. 123.

[4] 6 Id. 127. But see Glenny *v.* Hitchings, 4 How. Pr. R. 98.

SECTION III.

EFFECT OF THE PLEADINGS, AND WHAT FACTS DEEMED ADMITTED ON THE TRIAL.

It was a general rule under the former practice, both at common law and in equity, that material allegations of fact in a pleading which were not denied by the plea or answer, were for the purposes of the suit deemed to be admitted. The pleader confesses the fact which he does not expressly deny.[1]

The Code has adopted substantially the same rule as respects the complaint and the counterclaim set up by the defendant. Section 168, as amended in 1852, reads as follows:

"Every material allegation of the complaint, not controverted by the answer, as prescribed in section 149; and every material allegation of new matter in the answer constituting a counterclaim, not controverted by the reply as prescribed in section 153, shall, for the purposes of the action, be taken as true. But the allegation of new matter in the answer not relating to a counterclaim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance as the case may require."

[1] 8 Wend. 448, and 14 id. 507. 8 Paige, 68.

It is proper to remark that this section, before the last amendment, read so as to include the whole of the answer. Every material allegation of new matter in the answer, whether constituting a counterclaim or not, was required to be controverted, otherwise such allegation was admitted for the purposes of the suit. The amendment limits the operation of the section to new matter *constituting a counterclaim*, and expressly provides that all other allegations in the answer shall be deemed controverted without any reply.

The *allegations* of the pleadings within the meaning of this section are evidently allegations of fact. This was held in a very early case under the Code, and has not, it is believed, been questioned. JUSTICE BARCULO, in the case referred to,[1] held that the statute did not extend so far as to embrace averments of the *intention* with which a party had executed a written instrument; and in his opinion on this point, observes: "This statute must be confined to allegations of *fact*, and cannot refer to an averment of the legal construction, or effect, of written instruments; much less can it be applied to the intention or meaning of parties when they execute a written contract. To adopt the construction claimed by the defendant's counsel, would be to subvert not only the rules of pleading, but the plainest principles of justice. Instead of determining what the parties did, we should spend our time in the vain attempt of endeavoring to ascertain what they intended to do." There can be no doubt of the entire correctness of these views, and

[1] Barton *v.* Sackett and others, 3 How. Pr. R. 358; 1 Code R. 96, Dutchess Special Term, Dec. 1848.

they may be very safely applied to all mere inferences, conclusions of law, matters of evidence, &c., &c., set up in the pleadings, and which not being allegations *of fact*, need not be answered. So, too, the mere claim of a party, in his demand for relief, constitutes no portion of the complaint, and requires no reply, because no issue can be taken on it.[1] And where a party is *privileged* from answering under oath, by section 157, it seems he may omit to answer an allegation which may subject him to prosecution for felony without confessing the truth of such allegation.[2]

Not only must the allegations be allegations *of fact*, within the meaning of the section under consideration, but they must be *material* allegations. It is only every *material* allegation that is required to be controverted, or that falls directly within the provision of section 168.[3] No allegation in a complaint or answer can be deemed *material* within the meaning of the section, unless an issue can be taken upon it. Thus, in the cases above mentioned, as to the intention of parties, and the legal construction of written instruments,[4] the prayer for relief,[5] mere matters of evidence, expressions of opinion, redundancy, and irrelevancy, and generally everything stated in the pleadings, other than the naked facts on which the party's right of action depends, or which he must prove to

[1] Averill *v.* Taylor, 5 How. Pr. R. 476.

[2] See White *v.* Cummings, 3 Sand. 716, and ante.

[3] 6 Barb. S. C. R. 145, 6 How. Pr. R. 475.

[4] 3 How. Pr. R. 359.

[5] 5 Id. 476.

establish his counterclaim.[1] Every matter which *must* or which *may* be alleged[2] in the complaint, or the counterclaim, in order to protect it from demurrer for insufficiency, must also be traversed if the party pleading intend to controvert it on the trial. Everything else may be considered *immaterial* within the meaning of this section, and an omission to answer it will not be a confession of its truth.[3] Indeed, the courts seem to have gone farther than this, and to hold the doctrine that averments properly in the pleadings are not to be deemed admitted on the trial for want of an answer, unless they are such as on an issue taken upon them, whether of law or fact, will decide the cause, so far as relates to the particular cause of action to which it refers. This was held in the Superior Court of N. Y., with the concurrence of all the justices in the case of Newman *v.* Otto.[4] In reference to the word "material," as used in section 168, the court remarks, that as the Code has not defined its meaning, it must of course be understood in its old and established sense; and, therefore, that no allegation can be deemed material unless an issue taken upon it *will decide the cause so far as relates to the particular cause of action to which the allegation refers.* Facts pleaded in mitigation of damages in an action for libel were held not to be material within this definition. So, too, matter in aggravation of

[1] Isham *v.* Williamson, 7 L. O. 340.

[2] See as to such matters, chap. iv.

[3] Hurlow *v.* Hamilton, 6 How. Pr. R. 475, and see also, 6 Barb. S. C. R. 145, 7 L. O. 340.

[4] 4 Sand. 668.

damages when properly set forth in the complaint.[1] An omission to deny such matter, is not tantamount to a confession thereof on the trial, but in all cases the party pleading it will be put to his proof.

I have thus considered the nature of the *allegations* mentioned in section 168, and the question of their *materiality*. There is another point in this section worthy of attention. The language is peculiar and may be susceptible of two meanings. "Every material allegation of the complaint, not controverted by the answer, *as prescribed in section* 149," &c., is to be taken as true. It is deemed to be admitted only when not controverted *as prescribed* by the section referred to.* Is it an entire failure to deny the allegation which alone can have the effect of an admission, or will a failure to deny *in manner and form* as prescribed by the section referred to, have that effect?

We have seen[2] that a mere general denial under oath, which violates this rule of pleading prescribed by the Code, as if a party should deny the whole complaint, instead of *each* allegation thereof; or deny charges collectively, which should be denied disjunctively, is defective and may be reached on demurrer; or if manifestly evasive will be struck out on motion as a sham defence.† But will such defective denial

[1] Ante, pages 241, 409.

[2] Mott *v.* Burnett, 1 C. R., N. S. 225. Hance *v.* Rinning, id. 204.

* § 149. "The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief."

The language in respect to the reply is similar, § 153.

† This indeed seems to have been the construction in Wood

operate as an admission of the facts on the trial? Or, if the defendant, instead of denying *any knowledge or information sufficient to form a belief, as prescribed* by the Code, should deny his recollection of the fact, or attempt to traverse it on belief merely, is the fact to be deemed admitted for the purposes of the suit within the meaning of section 168? A literal construction of the language perhaps might involve such a conclusion; the words "as prescribed," no doubt, may be construed to mean "*in the manner* prescribed." This indeed seems to have been so held at Special Term in Doremus *v.* Lewis, a case which was subsequently reversed at the General Term,[1] though upon a different point from that now under consideration. On the argument of that case at Special Term, JUSTICE WILLARD held that a reply to the effect that the plaintiff had not sufficient knowledge to form a belief, which did not also "specifically controvert" the allegation, was insufficient, and that such reply admitted the matter so attempted to be answered. At the General Term the reply was held sufficient, and the judgment reversed without considering the other question as to the *effect* of such a reply as an admission on the trial. Without regarding the question, therefore, as directly adjudicated, I should much doubt the correctness of the practice

v. Staniels, in the N. Y. Common Pleas, 3 C. R. 152. A traverse that the defendant "*is ignorant of whether*," &c., was held insufficient and the facts so traversed were taken as admitted on the trial. This decision was sustained by the General Term of that court on appeal.

[1] 8 Barb. S. C. R. 124.

in this respect, indicated by decision at Special Term in Doremus *v.* Lewis.

The words "as prescribed," must refer to the substance, rather than the mere manner or form of the denial. In the case of Howell *v.* Fraser,[1] it was very properly said that the Code never intended that judgment should be given against a party who has merits for a mere matter of form; and it was held that if a pleading was correct in substance, though not in form, the remedy was not by demurrer, but by motion to make it more definite and certain, or in some way other than by demurrer. A demurrer, it will be recollected, *admits the facts;* if, therefore, the decision in the case last cited be correct, and a plaintiff is not entitled to judgment on a mere defect in the form or manner of stating the denial to his complaint, then such defect will not be considered on the trial as an admission of the facts. Thus, if the party denies on his "*belief*," as in the case of Howell *v.* Fraser, instead of in the formal manner prescribed by the Code, the opposite party should first be required to interpose some specific objection to the form of the pleading, either by motion to make it more definite, or in some other way. And even where a denial is so defective as to cease to be matter of *form* merely, and is substantially defective, as in the cases above mentioned, where it does not deny *each* allegation, &c., it will always be manifestly proper, and I think necessary, for the objecting party to correct it on motion, or by demurrer, before he will be allowed to treat it on the trial as an absolute admission of the facts under section 168.

[1] 6 How. Pr. R. 221.

The effect of the answer of one defendant on the rights of another, was considered in Woodworth *v.* Bellows and others.[1] If the answer of one defendant contain a proper case for the adjudication of equities between himself and a co-defendant, but contain no denial of the complaint, or any defence material on the question of the plaintiff's right to recover, it will be struck out on motion as irrelevant, and, perhaps, judgment might be rendered as on a frivolous defence. So far as the defendant, who fails to answer is concerned, he is not deemed as admitting anything alleged in an answer in which he does not participate. The facts stated in the complaint as to him, and those facts alone, are to be taken as true.[2]

The effect of a partial answer to a complaint, or an answer extending to only one distinct cause of action, was considered in Tracy and others *v.* Humphrey.[3] In that case the complaint claimed separate and distinct bills or accounts, and an aggregate amount as a balance due upon all; and the answer denied one bill only, and the balance claimed, but was silent as to the other two bills. The court held the effect of the pleadings to be the admission by defendant of the two accounts due, and on a motion to strike out a verified answer as false, suffered the answer to stand, and ordered judgment for the plaintiff on the two sums not denied, leaving the action to proceed in respect to the residue.

And by the Code when the answer of the de-

[1] 4 How. Pr. R. 24.

[2] 4 How. Pr. R. 24.

[3] 5 id. 154.

fendant admits part of the plaintiff's claim to be just, the court on motion, may order such defendant to satisfy that part of the claim, leaving the action to proceed as to the residue.[1]

SECTION IV.

PLEADINGS, HOW TO BE CONSTRUED.

THE rules whereby to determine the sufficiency of the pleadings under the Code, and the change effected by the Code in the former rules of pleading, both at law and in equity, were fully considered in chap. 1., section iv. of this work. It remains here briefly to notice generally the rules of construction applicable to pleadings, so far as the language and terms employed are concerned, and how these rules are affected by the Code.

It was a general rule under the old system, and frequently recognized in our courts, that where a pleading is equivocal, and two meanings present themselves, that construction shall be adopted which is most unfavourable to the party pleading.[2] This however, was only before answer to the pleading; for, after verdict, the equivocal expression was to be

[1] Am. Code, § 244.

[2] 1 Chit. Pl. 237, 1 Hill. 71, 2 id. 475.

construed in such a sense as would support the verdict.[1] It was also subject to certain other rules, namely, that the language of the pleading should have a reasonable intendment and construction;[2] and where an expression was capable of different meanings that should be taken which will support the declaration, &c., and not the other which would defeat it.[3] Thus, in an action on a bond conditioned that the plaintiff should enjoy certain land, &c.; a plea that, "after the making of the bond, until the day of exhibiting his bill, the plaintiff did enjoy" without averring that he enjoyed *continually*, was held to be good. And if a pleading can be made good by any state of facts consistent with its averments, it is sufficient. So held in Utica Insurance Company *v.* Scott,[4] in this state under the former system.

The rule as applied under the decisions of the courts, seems to have meant nothing more than that, if the expression or term used was capable of different meanings, the court would construe it to support the proceeding in which the particular term occurred, unless by doing so, they would be obliged to give it a meaning against which the uses, habits, and understanding of mankind would plainly revolt. This was the rule in regard to actions for words, either spoken or written, namely, that the court is to understand them according to their ordinary

[1] 2 John. 387, 15 East. 614.
[2] 5 East. 244, 12 id. 270.
[3] 13 John. 482.
[4] 8 Cow. 809.

acceptation among mankind;[1] and the rule is the same under the Code.[2] If, however, the expression or term was clearly capable of two different meanings, the pleading was to be liberally construed, and that construction was adopted which would render the pleading consistent with itself. If the sense was ambiguous, it might be helped by the context or other means; as if words of reference, such as, "*there*" and "*said*" were used, they would not be referred to the last antecedent, where the sense required that they should be referred to some prior antecedent.[3]

These rules for the construction of pleadings were liberal and proper, and went far towards relieving the proceedings of much of their formality. The Code seems to have substantially re-enacted them in section 159,[4] as follows:

> "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties."

I do not understand that this section refers to any thing further than the mere construction of the language and terms used in the pleading. It is in the construction of a pleading *for the purpose of determining its legal effect;* and is not one of those rules of construction whereby to determine the *sufficiency* of the pleadings, either as to the statement of facts which go to constitute the cause of action, or the denial and statement of defence in the answer;

[1] 5 John. 584, 3 Caines, 76, 5 East. 546.

[2] 6 How. Pr. R. 99, 5 id. 171. [3] 1 Chit. Pl. 237, 238.

[4] Am. Code.

though in Lewis *v.* Kendall,[1] it was intimated that the section might be applied to a defective pleading which violated the rules of the Code in these respects, yet the spirit of the decision is manifestly the other way; and the court in that case remarks: "I am satisfied the courts will have to enforce these rules with some rigor, or the present system of pleadings will never answer the purposes for which it was intended."

It will not do, therefore, for a party who has failed in alleging a good cause of action, or a sufficient defence, to endeavor to escape the consequences of bad pleading by throwing himself upon the *liberal construction*, authorized by section 159. The court is not authorized to construe a material allegation into a complaint which contains no such allegation, as for example, the consideration of a contract, or a demand of personal property, when such consideration or demand is necessary to be proved in order to entitle the plaintiff to recover. Nor, as in the case of Lewis *v.* Kendall, supra, can this section avail to make a hypothetical pleading good, or one which violates the general rules of pleading prescribed by the Code.

If this view is correct, it follows, that although the section in question may be in some sense a rule to determine the sufficiency of the pleadings, yet it applies merely to the construction of the language and the terms used, and has no reference to the question of the sufficiency of the facts or matters of substance pleaded. It is to be applied, as was the rule of construction under the old system, mainly where words are equivocal, and

[1] 6 How. Pr. R. 65.

terms and expressions are capable of different meanings. In all these cases the construction is to be *liberal*, for the purpose of determining the effect of the allegation, and with a view to substantial justice between the parties. It should be as *liberal* certainly as under the old practice; more so, it could scarcely well be; for, as we have seen, in the case of an ambiguous expression, the court would adopt the meaning most favorable to the pleader when necessary to sustain his pleading, if it could be done without violence to the clear and palpable meaning of the term or expression in its common acceptation. Perhaps, under the Code, cases might arise where a *liberal construction*, with a view to substantial justice, would authorize the court to go further and adopt a construction in aid of a doubtful pleading, which would do violence to the common acceptation of the term, but this being a matter entirely discretionary, it will be unnecessary to speculate upon it here.

The construction is to be liberal, for the purpose of *determining its effect.* I understand this to mean its effect generally as a pleading in the cause, in whatever way the question is raised; and not merely its effect as an admission on the trial under section 168. No doubt cases will occur where, in the construction of the language of a pleading for the purpose of determining its effect, a less rigorous rule of construction may be authorized under this section than under the former practice. Thus, when a pleader formerly undertook to assign a breach, not according to its letter, but coming within the substance, or effect of the covenant, he was held to a more strict rule than when he followed negatively or

affirmatively the words of the covenant.[1] A mere technical defect in this particular will now undoubtedly be remedied under this section; and if the breach assigned be substantially sufficient, it will be good. And so in other cases.

The effect of the pleading, too, as an admission in the cause under section 168, may also sometimes properly be assisted by this section. If the denial is not strictly in manner "*as prescribed*" by the Code, and even if it be so defective as to present a fair ground for demurrer, yet if it be *intended* as a denial, and the opposite party have neglected to raise the question by demurrer or on motion, a *liberal construction* would authorize the court to give it the effect of a traverse on the trial.[2]

SECTION V.

SPECIAL RULES APPLICABLE TO PLEADINGS.

In the preceding chapters relative to the complaint, the answer, the reply, and the demurrer, respectively, the principal general rules applicable to, and which, under the Code, determine the sufficiency of these several pleadings, have been considered, and

[1] 4 Hill, 154, ante, page 168.

[2] See last section.

it remains in this place briefly to notice some special rules provided by the Code, or retained from the old system, applicable mainly to the form of the pleadings, and, first:

"Every pleading in a Court of Record must be subscribed by the party, or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also."[1]

The subject of the verification of the pleadings has already been considered in the preceding chapters on the complaint, answer, and reply. In respect to the rule laid down in the above section of the Code, that every pleading must be subscribed by the party or his attorney, it is to be observed that a failure to comply with the rule would be an irregularity which would render the pleading liable to be set aside on motion, precisely the same as a defect in the title of the complaint, or a failure to demand the relief to which the plaintiff supposes himself entitled, as to which see ante, chap. iv. sections 1 and 3. Such a defect is not a matter of substance, and would not, therefore, be the subject of demurrer. Nor would it be correct practice, it is conceived, to treat the pleading as a nullity and enter judgment, as was done in Hubbel *v.* Livingston,[2] at least not until the pleading had been returned, or notice of the defect given to the opposite party. In the case last cited, it was held that a subscription to the affidavit of verification alone was a sufficient subscrip-

[1] Am. Code, § 156.

[2] 1 C. R. 63.

tion of the pleading within the meaning of the Code. The rules of the court provide that every pleading exceeding two folios in length, must have the folios distinctly numbered and marked in the margin thereof; and the pleadings and other proceedings must be fairly and legibly written.[1] This is similar to the former rule in regard to equity pleadings.[2] If not so written, the clerk is prohibited from filing them.[3] This seems to be the only consequence of a violation of the rule, although, perhaps, in a flagrant case it might be treated as an irregularity which the court would correct on motion. So, too, by the new rules several defenses are required to be not only separately stated, but plainly numbered.

The items of an account are not necessary to be set forth in a pleading under the Code.[4] But the Code provides that the party pleading an account, shall deliver within ten days after demand a copy of the account. The answer, however, must be to the pleading itself, and not to the bill of particulars. An answer avowedly to the bill of particulars, and not to the complaint, was held to be insufficient, and liable to demurrer.[5] An answer alleging a set-off in a sum of money equal to the sum claimed by the plaintiff, "as will appear by the account current rendered by the defendant as stated in the complaint," is indefinite and uncertain. On an order to make such an answer more definite and certain by amendment, the defendant stated his set-off to be

[1] Sup. Court Rule 44. [2] Rule 74. [3] S. C. R. Rule 44.
[4] Am. Code, § 135. [5] Scovill *v.* Howell, 2 C. R. 33.

generally for work and labor, merchandise, etc. Held no compliance with the order, and the answer struck out with costs.[1] And see further as to the manner of pleading an account on the part of the plaintiff, ante, pages 169, 170, and on the part of the defendant, ante, pages 313, 314.

We have already considered the special rules provided by the Code in pleading, first a judgment or determination of a court or officer of special jurisdiction;[2] second, the performance of conditions precedent in a contract, and a written instrument for the payment of money;[3] third, a private statute;[4] fourth, in cases of libel and slander;[5] and fifth, in an action to recover property distrained doing damage.[6] It will only be necessary here to refer to what was said on these subjects respectively in the preceding pages. These rules are of general application, and, of course, abolish whatever in the old system conflicted with them. They may properly be classed here as *special rules* of pleading, because unlike those broader principles elsewhere enunciated and laid down in the Code, they relate rather to the form and manner than to the substance of the pleading. They are, also, it will be observed, in the main permissive, rather than obligatory; leaving it optional with the party to plead the facts in the manner indicated in these sections, or to adopt the stricter rules of pleading. Thus, in an action or defence on a written instrument for the payment of

[1] Wiggins *v.* Gans, 3 Sand. 738.
[2] § 161, ante, page 163.
[3] § 162, ante, pages 142, 162.
[4] § 163, ante, page 163.
[5] §§ 164, 165, ante, pages 164 to 167, 264 to 270.
[6] § 166, ante, page 270.

money only, "*it shall be sufficient* for the party to give a copy of the instrument," etc. Or he may state it in his complaint in the usual form of stating a cause of action. So in pleading a private statute, it is *sufficient* to refer to such statute, by its title and the day of its passage; but if the party choose to plead it in the old form and manner, he may, doubtless, do so without incurring the hazard of a motion to strike out the matter as redundant.

There are also a variety of other special rules relative to pleadings, so far as the form and manner of statement are concerned, which though properly belonging to the old system, are not inapplicable to the new. Many of these we have incidentally noticed in various parts of this work, and do not intend to refer to them again in this place. One or two others, however, may be briefly noticed here.

Thus, under the present system, as under the former, every answer to be good must either traverse or deny the facts of the previous pleading, or it must confess and avoid them. Under the former system a pleading in confession and avoidance must give *color*; that is, it must confess the matter adversely alleged, either expressly or impliedly, to such an extent at least as to admit some apparent right in the opposite party, which requires to be encountered and *avoided* by the allegation of the new matter.[1] It was not required, however, to be an absolute confession, but might be *sub modo* merely, so far as to admit some sort of apparent right or *color* for the action; as, in an action for trespass for taking sheep, the defendant may

[1] Steph. Pl. 201, 1 Chit. Pl. 527. 1 Hill, 266, 6 id. 311.

plead that a third person was possessed of them, and sold them to him in market overt, for though this does not admit the sheep to have been *the plaintiff's* when the defendant took them, as alleged in the declaration, yet it admits them to have been his subject to the effect of the sale in market overt, and therefore gives some color to the plaintiff's claim.[1] This principle of giving color to the plaintiff's claim may be applied to confession and avoidance in an answer under the Code. Such an answer to be good, must admit an apparent or *prima facie right* of action independent of the matter disclosed in the plea to destroy it. And it has so been held under the Code.[2] "The principles of pleading," says the Justice who delivered the opinion in the case last cited, "whatever the system, are always the same. Its office is to present the cause of action on one side, and a defence on the other. This is not less true under our present system, than it was under the former. Names are changed—useless forms and technical rules are abolished—but the principles remain unchanged. What now is a good answer, would before have constituted a good plea in bar."[3]

Again, at common law, it was a principle that every pleading must be an answer to the whole of what is adversely alleged.[4] A pleading professing to answer the whole, and answering only a part, is

[1] Steph. Pl. 203.

[2] Ruddington *v.* Davis, 6 How. Pr. R. 402.

[3] And see, as to *color*, opinion of SELDEN J. in Benedict *v.* Seymour, 6 How. Pr. R. 305, 306.

[4] Steph. Pl. 214, 13 Wend. 78.

bad on demurrer.[1] This special rule of pleading has also been held applicable under the Code, and a pleading, commencing as an answer to the whole complaint, and assuming to answer the whole, but containing facts which only constitute a defence to a part of the complaint, held bad on demurrer.[2] But the rule does not apply to a *partial defence*, when allowed to be pleaded by the Code, such as recoupment or set-off.[3]

It was also a rule of pleading at law, that a traverse could not be taken upon matter not alleged, with the exception, however, that it might be taken upon matter, which though not expressly alleged, is necessarily implied.[4] The effect of this rule, and its application to pleadings under the Code, have been already briefly noticed in sections 2 and 3 of chapter v. The principle is very clearly and definitely recognized in Giesson *v.* Giesson,[5] and Lord *v.* Cheeseborough.[6] Thus, as in the former case, in an action on a promissory note, an answer averring payment is a proper traverse to the fact that the note is not paid, a fact implied in the complaint from the plaintiff's possession of the note; and, as in the latter case, the defendant in such an action has a right to traverse the plaintiff's ownership, or interest in the

[1] 1 Chit. Pl. 510, 1 Wend. 347, 23 id. 487.

[2] Thumb *v.* Walrath, 6 How. Pr. R. 196.

[3] Willis *v.* Taggard, 6 id. 433.

[4] Steph. Pl. 192, 193, 2 Sack. 629, 6 Mod. 158.

[5] 1 C. R., N. S. 414.

[6] 4 Sand. 696.

note, though the ownership be not expressly alleged in the complaint. The rule is also very clearly illustrated in actions for libel and slander, in cases where malice must be proved, but need not be *expressly* alleged. The malice implied from the facts set forth in the complaint is a *material* allegation, which may be traversed or denied by the defendant's answer, and thus an issue raised thereon.[1] Many other examples in illustration of the principle might be given, but the above will suffice to explain its general nature.

A good issue at common law could not be joined on *two affirmatives*, or *two negatives*. An example of the first kind, is, where the defendant pleads that a party died seized in fee, and the plaintiff replied affirmatively that he died seized in tail.[2] An instance of the latter kind, is, where a plea states a request to deliver an abstract of title, and a refusal; a replication, that the plaintiff *did not neglect and refuse* to deliver such abstract would be insufficient; he should allege affirmatively that he did deliver.[3] These rules, though artificial and technical, are founded in good sense, and though, perhaps, not essential in most cases, to the validity of a pleading under the liberal system adopted by the Code, yet, it would be well in framing an issue always to observe them. In the late case of Giesson *v.* Giesson,[4] the Court of Appeals defines an *issue* to be substantially the same as it was under the former system, and of course a good tra-

[1] See on this point, ante, pages 268, 269, and cases there cited.
[2] Steph. Pl. 385. [3] 6 East. 556, 557.
[4] 1 C. R., N. S. 414.

verse must be taken in the same way. "An issue is joined," as was said in that case, "when there is as *direct affirmation* and *denial* of the fact in dispute, and it makes no difference whether the affirmative or the negative is first averred." It is not a violent inference, from this language to say, that two *affirmative* propositions, or two *negative* propositions cannot form such an issue. And perhaps cases might occur under the Code in which such an answer would be held evasive, and, if not struck out on motion, might at least be made more definite and certain by amendment.

A similar defect in pleading is what was called *a negative pregnant.* This was such a form of denial as implied or carried with it an affirmative, and was susceptible of a double meaning. As, for example, in an action of trespass, the defendant pleaded that he entered the plaintiff's house by license given by plaintiff's daughter, and the plaintiff replied that *he did not enter by her license.* This was considered a *negative pregnant*, and it was held that the plaintiff should have traversed the entry by itself, or the license by itself.[1] Such a pleading is said to be bad for *ambiguity.* While professing to deny the license, it implies, or carries with it, the idea that the license was given. Such a defect in a traverse, under the Code, particularly where it purports to answer a verified pleading, may amount to a mere evasion, and render the pleading liable to be corrected on motion.

It was also a rule of pleading, and one which may with great propriety be applied to the Code, that *a*

[1] Steph. Pl. 381.

traverse must be neither too large, nor too narrow. A traverse may be too large, by being taken in the conjunctive instead of the disjunctive, or by involving in the issue quantity, time, place, or other circumstances, which though forming part of the allegations traversed, are immaterial to the merits of the cause. So, too, it may be too narrow, by being applied only to part of a cause of action; or, of an allegation, which the law considers as in its nature indivisible.[1] A familiar example of the former kind of traverse is found in a case where the defendant alleged that he had served the plaintiff half a year at D., in the county of K., and the plaintiff replied, that he had not served him half a year *at D., in the county of K.* This was held bad as involving *the place*, in the issue.[2] Where a plaintiff alleges a series of charges as his cause of action, proof of any one of which will entitle him to recover, and the defendant denies these charges *conjunctively*, the traverse is too large, and the answer will be insufficient. This rule has been expressly adjudged to apply under the Code, and an answer to a complaint for assault and battery, denying in the language of the complaint, that the defendant did "assault the plaintiff, *and* seize him by the collar, *and* shake him violently," was held bad on demurrer.[3] It should be observed, however, that in many cases where a traverse following the exact language of the complaint would be, technically speaking, too broad, as involving time, place,

[1] Steph. Pl. 248, 249.

[2] Steph. Pl. 248, 249.

[3] Hopkins *v.* Everett, 6 How. Pr. R. 159.

or other immaterial matters in the issue, the defect is merely a matter of form in the statement, and if liable to objection at all should be on motion to correct the pleading, rather than by demurrer, unless it be manifestly evasive. The same may be said with respect to a traverse that is too narrow; as, for example, if in a complaint for labor and services, from January 1st, 1851, to January 1st, 1852, the defendant should deny that the plaintiff worked for the whole time alleged. The defendant being entitled to compensation for part of his services, it is no sufficient answer to say, that he did not work the full time; and the court would, doubtless, on motion, compel the defendant to correct his pleading.

Most of the other rules relative to the mode and manner, as well as the form of pleading, which are still in force as rules of logic, at all events, if not absolute rules "to determine the sufficiency" of the pleadings, have been already noticed in various parts of this work, and the extent of their application under the Code considered. I shall not attempt to detail or classify them here, or to pursue the investigation farther. One or two brief remarks relative to certain rules of pleading which have become obsolete and can have no application to the new system, will close this branch of the subject.

When an issue of law was tendered on a demurrer, the opposite party was bound to accept it, which he did by putting in a formal *joinder in demurrer*. This is now no longer necessary; the demurrer itself raises the issue.[1]

[1] Morgan v. Leland, 1 C. R. 123.

The rules relative to pleading in all mere matters of form, such as time, place, &c., when not material to the issue, or necessary to apprise the opposite party of the exact nature and extent of the claim, are no longer in force. So, too, the rule that pleadings should observe the known and ancient forms of expression as contained in approved precedents. In pleading the statute of limitations, the defendant alleged that *he was not guilty within six years*, instead of alleging that *the cause of action did not accrue within six years;* and this was held defective in special demurrer.[1] All these technical rules are, of course, abrogated by the Code.

So, too, it is conceived, in respect to the rule that a plea which amounted to the general issue was defective, and liable to demurrer, as, in an action on a bond, if the defendant, instead of pleading the general issue *non est factum*, should confess the bond, but allege that it was executed to a person other than the plaintiff, this pleading under the old system was held bad.[2] Such an answer, setting up as it does the facts, would now, it is presumed, be good, and the above rule, if not wholly obsolete, can have but a very limited application.[3] As to the rule that matters are to be pleaded according to their legal effect, see ante, pages 148 et seq.

There are a variety of minor miscellaneous rules also which were peculiarly adapted to the old system, but have now become obsolete. Thus, the rules re-

[1] 3 Barn. and Ald. 448. [2] 1 Sid. 470.

[3] See remarks on this subject, ante, pages 261, 262.

lative to the entitling of pleadings, the formal commencement and conclusion of pleadings, &c., &c. All these, it is evident, can no longer apply under the Code. It was also a general rule that a plaintiff claiming under, and pleading a deed or other sealed instrument, or letters testamentary, or letters of administration, was bound to make *profert*, as it was called, which was to the effect that the party "now brings the said indenture (or other instrument) here into court." If not so alleged, the pleading was defective. This formality is now dispensed with under the Code. So held in Bright *v.* Currie,[1] in an action brought by an administrator, that profert of his letters of administration is not necessary.

[1] 10 L. O. 104.

CHAPTER IX.

OF AMENDMENTS, VARIANCES, AND MISTAKES IN PLEADING.

THE subject of the amendment of pleadings and of variances between the pleadings and proof on the trial, is one of considerable importance, and requires a particular consideration. The subject will be treated in the following order:

1. Amendments in general, how, and when allowed, and on what terms.
2. Variances between pleadings and proof.
3. Defects in pleading, when, and how aided.

SECTION I.

AMENDMENTS IN GENERAL, HOW, AND WHEN ALLOWED, AND ON WHAT TERMS.

AT common law, amendments could be made at any time before judgment was signed in the discre-

tion of the court. They might be allowed, either of course, without motion, upon motion after notice, or on the argument of motions made by the adverse party for the purpose of taking advantage of the defect. A declaration might be amended of course at any time before the defendant put in his defence.[1] And by the rules of the court, within a certain time after defence put in, or before default for not replying, the plaintiff might amend in certain cases,[2] such as by changing the venue, by increasing the damages laid where there is no bail,[3] but not by adding new counts, or by inserting the name of a party defendant who has not been served with process,[4] &c. &c. The defendant also might amend of course, without costs, on a proper affidavit; but, if he wished to add a new plea, or it was necessary to amend a second time, leave of the court must be obtained.[5]

Similar rules obtained in respect to pleadings in equity. The plaintiff might amend his complaint of course, and the defendant his answer of course in certain cases, or after the time for answering had expired, or, on a demurrer to the matter of the whole bill, he might be allowed to amend on motion in the discretion of the court.[6]

But amendments *after* judgment were not allowed at common law. The statutes of amendments and *jeofails* were designed to remedy this inconvenience, and to authorize certain amendments to the proceedings after judgment. These various statutes were

[1] 7 Cow. 164.
[2] 2 John. Cas. 219,
[3] 1 Burr. Pr. 176.
[4] But see 4 Hill, 550.
[5] 1 Wend. 71.
[6] See Equity Practice in this respect, 1 Barb. Ch. Pr. 206 to 225.

re-enacted with some alterations in this State, at an early day, and were in substance incorporated into the Revised Statutes.[1]

Before proceeding to consider the provisions made in respect to amendments of the pleadings by the Code, I shall briefly notice the provisions of the statute, and the practice in the courts, before the Code, for the purpose of ascertaining how much, (if any,) of that practice still remains.

The first section in the title of the Revised Statutes, above referred to, provided as follows:—

"The court in which any action shall be pending, shall have power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein."[2]

The fourth section of the same title provides that *after* judgment, any defect, or imperfection, in matters of form, contained in the record, pleadings, &c., may be amended by the court in affirmance of the judgment.

And by the seventh section of the act judgment should not be reversed, or stayed after verdict, (among various other things,[3]) for the following causes:—

"For any mispleading, miscontinuance, or discontinuance, insufficient pleading, lack of color, jeofail, or misjoining of issue."

[1] R. S. Title v. chap. vii., Part 3.

[2] 2 R. S. (3d ed.) p. 519.

[3] As to which see statute, 2 R. S. (3d ed.) p. 520, § 7.

"For the want of any allegation, or averment, on account of which omission a special demurrer could have been entertained."

"For omitting any allegation, or averment of any matter, without proving which, the jury ought not to have given such verdict."

"For any mistake in the name of any party or person; or in reciting or stating any day, month, or year, when the correct name, time, sum, or description, shall have been once rightly alleged, in any of the pleadings or proceedings."

And by the eighth section all other imperfections, defects, &c., "*of the like nature*, not being against the right and justice of the matter of the suit, and not altering the issue between the parties, or the trial," might be supplied and amended.

By statute also a variance between pleading and proof might be disregarded on the trial in certain specified cases,[1] when such pleading could be amended by the court after verdict. But in order to authorize this, the court must be satisfied that the party objecting has not been surprised and misled by it, or prevented from making due preparation for a full answer on the merits. Whether he was likely to have been so surprised, or misled, &c., was a question for the court in the exercise of a sound discretion.[2] Under the like qualifications, it was said, independent of the statute, amendments might be made at the trial, of most variances between pleading and proof where the action was founded on an oral contract or wrong.[3]

[1] See 2 R. S. (3d ed.) p. 504, § 98.

[2] 15 Wend. 672, 3, 17 id. 113, 19 id. 542.

[3] 19 Wend. 542, and see Cow. and Hill's Notes, 521, 2.

Under the above statutes, and the practice adopted by the courts of this state before the Code, it was held that any matter was amendable before verdict, which could be cured by verdict.[1] The court would not allow a mere formal objection to defeat an action, but, in "furtherance of justice,"[2] and provided no injury was sustained by the party opposing, would allow amendments at any stage of the cause.[3] A variance, not affecting the merits, would be disregarded at bar, without ordering an amendment, leaving the party to apply for such amendment if he deemed it advisable.[4]

But a plaintiff was not permitted to amend his declaration, by inserting the name of a person as defendant who was not served with process.[5] Nor, as a general rule, would the courts grant leave to amend, to enable a party to sustain an unconscionable defence.[6] A defendant would not be allowed to set up the statute of limitations as an amendment.[7] But he might amend an unconscionable plea if adjudged defective.[8] A defendant was permitted to add a plea of justification in an action of slander, after issue joined.[9] So, too, in slander, a declaration might be amended after issue, especially in a case where, on a discontinuance, the statute of limitations would

[1] 10 Wend. 214.

[2] With this qualification, the discretion of the court in allowing amendments was unlimited.

[3] 6 Cow. 360, 1 id. 670.

[4] 1 Sand. 719.

[5] 1 Wend. 71.

[6] 6 Cow. 606, 3 Wend. 572.

[7] 2 Wend. 608.

[8] 3 Wend. 373.

[9] 1 Hill, 637.

attach.[1] But in such action a count for a newly discovered cause of action, barred by the statute, could not be added.[2] Although the court would allow amendment in penal, as well as in ordinary actions,[3] yet the plaintiff was not allowed in a penal action for usury to amend, so as to save the statute of limitations.[4] The merits of the proposed amendment would not be enquired into by the court further than to ascertain that it was not frivolous.[5]

After verdict, amendments were also liberally allowed. On a general count, which the testimony on the trial did not sustain, the plaintiff, after verdict, was permitted to add a proper count.[6] And in Miller *v.* Watson,[7] after three trials, and though the statute had run, a count on a special agreement was added, the agreement having been proved on the trials without objection. In a declaration by executors, alleging a promise to the testator, the plaintiffs were permitted to amend after trial, by alleging the promises to have been made to them as executors, special circumstance appearing to warrant it.[8] And, so, too, after a report of referees, though the objection was made during the trial.[9] In such cases, amendments will be allowed on terms.[10] Where the plaintiff has a verdict against him on the facts, judgment against him on demurrer is final.[11] So, too, if the

[1] 1 Wend. 93.
[2] 1 Hill. 637.
[3] 17 John. 346.
[4] 7 Cow. 92.
[5] 20 Wend. 668.
[6] 6 Wend. 516.
[7] 4 Cow. 555.
[8] 6 Wend. 506.
[9] 1 Sand. 70, 72.
[10] Same cases, and see 6 Cow. 360, 3 Wend. 356.
[11] 21 Wend. 255.

plaintiff have a verdict on an issue of fact in the cause, the defendant, if judgment be against him on demurrer, cannot have leave to amend.[1]

In equity, also, amendments were allowed with great liberality, both before, and at, and after the hearing, particularly amendments relative to parties. On a demurrer allowed for matters of form, the complainant was suffered to amend on terms.[2] After exception to the answer, the plaintiff might have leave to amend on terms by adding new charges and new parties.[3] But after the cause had been set down for hearing he would not be allowed to amend his bill by adding new charges.[4] Though he might in such case be permitted to file a supplemental bill.[5] As a general rule, however, amendments to pleadings which were sworn to, were allowed with great caution.[6] But if the amendments were merely in addition to, and not inconsistent with, the matter of the bill, they might be made, and that, too, of course, and without costs.[7]

It will be unnecessary to consider further the subject of amendments under the statute, and the former practice of our courts in law and equity. What has thus far been said will serve as a proper introduction to the consideration of the subject as defined in the Code, and practically illustrated by the later decisions of our courts.

[1] 18 John. 28.
[2] 3 Paige, 505.
[3] 3 John. Ch. R. 410.
[4] 3 Barb. Ch. R. 637. 3 John. Ch. R. 423.
[5] 4 John. Ch. R. 363.
[6] 1 Edw. 46.
[7] 1 Barb. Ch. Pr. 210.

The sixth chapter of Title 6, Part 2 of the Code, relative to mistakes in pleading and amendments, professes to prescribe the cases and circumstances in which amendments may be made to the pleadings and proceedings, and variances at the trial disregarded. The commissioners, in their note to this chapter, (which seems designed to supersede the former provisions of the statute), say, that they have provided a means of amendment of the most liberal character; as liberal, indeed, as they could devise.[1] I shall consider, in this place, simply the subject of amendments to the pleadings, leaving that of *variances* for the following section.

The Code provides that the pleadings may be corrected by amendment, as under the former practice, in three ways or classes of cases:—*First.* By the party himself, of course, without application to the court. *Second.* By the court, on application of the party desiring the amendment. *Third.* By the court, either at the trial, on judgment rendered, or on motion of the adverse party seeking to take advantage of the defect. Each of these will now be considered.

1. *Amendment of course.*—That portion of the Code which makes provision on this subject, is in these words:

"Any pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or, it can be so amended at any time within twenty days after the service of the answer, or demurrer, to

[1] First Report of Comrs. p. 168.

such pleading, unless it be made to appear to the court that it was done for the purposes of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is or may be noticed; and, if it appear to the court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court may seem just. In such case, a copy of the amended pleading must be served on the adverse party."[1]

The remaining part of the section relates to amendments after judgments on demurrer, which will be considered in its proper place.

The pleading, under this section, can be amended at any time, before it is actually answered, or before the time limited by law for answering expires. After the service of an answer or demurrer, the defendant has twenty days to amend of course; but if the pleading be served by mail, he has forty days, and the rule applies to the case of a reply.[2] An *amended* complaint may be served of course at any time, within twenty days after an *amended* answer is served, although more than twenty days have elapsed from the service of the original answer, and replication thereto; and in such case the amended pleading takes the place of and supersedes the original.[3]

The right to amend may be waived, it seems, either by express notice from the party, that he will not amend, or by noticing the cause for trial.[4] And

[1] Am. Code, § 172.

[2] Cusson *v.* Whallon, 5 How. Pr. R. 302, Washburn *v.* Herrick, 4 id. 15.

[3] Seneca County Bank *v.* Garlinghouse, 4 id. 174.

[4] 5 How. Pr. R. 305.

an amendment for delay merely cannot be made. A frivolous amendment, such as would not have been allowed by the former practice, will, doubtless, be struck out on motion, if the loss of a circuit or term will be occasioned by such amendment.

An issue is joined by the service of the pleading. A party is not bound to wait, before giving notice of trial or reference, to see whether the pleadings will be amended. He has a right to act upon them as they are served.[1] But he proceeds at his peril; and, if before the time for amending expires he takes judgment, and afterwards an amended pleading be served, the judgment will be set aside;[2] though, if no such amended pleading be served, the judgment would be regular.

Though the amendment may be made, under the above section, of course, and without costs, yet, it cannot be made where the party wishing to amend has not been regular, and his adversary has already taken steps for a motion to the court founded on such irregularity. So held by JUSTICE WELLS in Williams *v.* Wilkinson,[3] and by JUSTICE MUNSON in Hall *v.* Huntley.[4] In each of these cases the complaint was defective in not mentioning the name of the county, and after notice of motion by defendant to set aside complaint, held that the plaintiff could not amend without payment of costs of motion. And upon the same principle, it would seem, where irrelevant and

[1] Enos *v.* Thomas, 4 How. Pr. R. 290, 5 id. 305.

[2] Morgan *v.* Leland, 1 C. R. 123, 1 Cow. R. 152.

[3] 5 How. Pr. R. 357.

[4] 1 C. R., N. S. 20, and note.

redundant matter is inserted in the pleading, and notice of motion has been given to correct the pleading by striking out such matter, or by making it more definite by amendment, the party committing the error should be held to pay costs of the motion before he is allowed to amend. It is believed this has been repeatedly held, in cases not reported, though the practice is said to be different in one or two of the Judicial districts. The practice of permitting amendments to be made in such cases without costs, must necessarily lead to greater looseness in pleading. A party might wilfully encumber his complaint, or answer, with matters of surplusage, and wait to see whether his adversary would take the objection, and point it out to him by way of notice of motion, in which case, he might amend without costs; otherwise the defective pleading would stand. This kind of experimental practice ought not to be encouraged.

The language of the section under consideration does not, in terms, limit the right of the party to amend of course, to any particular kind of amendment, except only that such amendment must not be for the purpose of delay. In practice, however, he has not an unlimited right of amendment. He cannot amend, of course, by substituting one claim for another, of a different nature, or by instituting a new action against other parties.

The section above quoted has been held to apply only to such amendments as will not create an action between *other* parties than those who are originally parties to the suit. Thus, in Russell *v.* Spear and Butler,[1] it was very properly decided, that a plaintiff

[1] 5 How. Pr. R. 142, 3 C. R. 189.

could not amend his complaint of course by striking out the names of parties. There is no part of the Code, it was said, which permitted the plaintiff to change the parties in the cause, without leave of the court, and the practice under the Code in this respect was likened to the former practice at law and in equity. Nor, on the same principle, it is presumed, would a plaintiff be allowed to amend, as of course, by setting up a different *claim*, though, perhaps, he might amend by changing, in form, the "cause of action," if the "claim" remain the same, even from contract to tort, as it is said he may be allowed to do on motion to the court.[1] But in most cases, it seems, he may amend of course, where the same amendment would be allowed on the trial.[2] Amendments, however, must be confined to matter in existence at the commencement of the suit. An amended complaint, alleging matters which occurred subsequent to the service of the original, is irregular, and may be set aside on motion, or the new subsequent matter may be struck out.[3] Such matters should be brought before the court by supplemental pleading.[4]

The amended pleading must be served on the opposite party, and he is required to reply to it as to an original pleading, the amended pleading taking the place thereof; and any previous answer to the original pleading is entirely waived. But full time to answer is allowed from the date of service of the amended pleading.[5]

[1] Chapman *v.* Webb, 6 How. Pr. R. 390; 1 C. R., N. S. 388.
[2] Getty *v.* H. R., R. R. Co. 6 How. Pr. R. 269.
[3] Hornfager *v.* Hornfager, 6 How. Pr. R. 13.
[4] Ante, pages 224 to 228. [5] Dickinson *v.* Beardsly, 1 C. R. 37.

After issue joined, the cause noticed for trial, and the plaintiff examined as a witness by the defendant, such defendant has no right to amend his answer of course, and can do so only on application to the court.[1] Nor can a defendant serve an amended answer after issue joined, which is identical in legal effect with the original answer; and if so served such amended answer will be struck out on motion.[2]

The plaintiff, after reply to an answer served with a demurrer written on the same paper, is not bound to reply again to the same answer served on him as an amended answer, with merely the demurrer omitted. The answer in such case is not amended.[3] And in case a verified complaint is served as an amendment, after answer to the same complaint originally served, the defendant is not bound to answer the verified complaint, it not being an *amendment*, and judgment against the defendant for want of such answer will be set aside for irregularity.[4]

In the case of Spalding *v.* Spalding,[5] it is said by JUSTICE SILL, in relation to the section of the Code allowing amendments of course without application to the court, that it is "simply an enactment of what has been a standing rule of the Supreme Court ever since 1796, except the rules gave more time for the exercise of this privilege than is allowed by the Code; and it is hardly necessary to say, that no one will construe this section as allowing amendments which the court is prohibited from allowing upon special

[1] Snyder *v.* White, 6 How. Pr. R. 321. [2] Id.
[3] Howard *v.* Michigan R. R. Co. 5 How. Pr. R. 206.
[4] George *v.* M'Avoy. 6 id. 200, 1 C. R., N. S. 318.
[5] 3 How. Pr. R. 297.

application." If this position is correct, it is only such amendments as the court upon special motion may allow that can be regularly made of course within the time and manner specified by the Code. But it does not follow, as we have seen, that whatever amendment the court, in its discretion, may allow on motion, can be made by the party of course; as, for example, the striking out of a party defendant, or changing the parties in a cause, which can be done only by order of the court.[1]

Let us now briefly consider:

2. *What amendments may be made by the court on application, and how and on what terms allowed.* The Code makes provision for this class of cases, as follows:

"The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, *or*[2] when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved."[3]

In order to obtain a correct idea of the extent of the changes made by the Code in the practice of allowing amendments to the pleadings, it may be

[1] Ante, pages 500, 501.

[2] The word "or" was omitted in the amendment of 1851, but is now in the section as it stands. See 6 How. Pr. R. 390.

[3] Am. Code, § 173. § 149 Orig.

well to compare this section with the sections of the Revised Statutes, cited ante, pages 492, 493.

In a very early case under the Code,[1] JUSTICE MASON, in considering the force and effect of this section of the Code, remarks, that he thinks the statute of amendments, as contained in the Revised Statutes, is undoubtedly retained by the Code. "I do not see," he say, "that there is any conflict between the two, and I apprehend that the design of the Code was to leave the statute of amendments as contained in the Revised Statutes[2] untouched; and these provisions in relation to amendments as contained in the Code, are to be considered only in addition to, and as a further power of amendment conferred upon the courts; and, it seems to me, we must consider these provisions of the Revised Statutes in relation to amendments in connexion with the provisions of the Code." JUSTICE SILL, on the contrary, in Spalding *v.* Spalding, cited above, considered the section in question as designed to take the place of the statute, and held, substantially, that the Code had somewhat *restricted* the power of allowing amendments, by prohibiting an amendment which changed substantially the cause of action, (claim), or defence, and which, he was of opinion, might be done under the old practice. This doctrine was dissented from by JUSTICE PARKER in Dows and Cary *v.* Green and Mather,[3] who allowed the *form* of action, or

[1] Brown *v.* Babcock, Special Term, Sept. 1848, 1 C. R. 66, 3 How. Pr. R. 305.

[2] Part 3, Chap. 7, Title 5, Art. 4.

[3] 3 How. Pr. R. 388.

rather the class to which it belonged, to be changed by amendment, holding the restriction in the Code to have been intended merely to prevent an amendment which would substitute an entirely new *subject of controversy*. "Under the Revised Statutes," he remarks, "the discretion of the court in making amendments was not limited; and under that section,[1] the court frequently allowed a change of the form of action.—1 How. Pr. R. 82; 2 id. 43; 3 id. 148. It is not the policy of later legislation *to restrict*, but rather to *encourage* amendments, so that every cause, if practicable, shall be decided on the merits; and to effect this, the form must always yield to the substance."

This seems to be entirely in accordance with the views expressed by the commissioners of the Code.[2] And it agrees with what was said in Brown *v.* Babcock, supra, and also with a late case in the N. Y. Common Pleas, decided since the amendment which changed the words "cause of action" into the word "claim."[3] In the case last cited, an amendment was allowed after issue joined, the effect of which was to change a cause of action founded upon contract into an action of tort. In Dows and Cary *v.* Green, above cited, it was held the plaintiff might amend a complaint claiming a judgment for damages for the value of personal property unjustly detained, so as to allow him to proceed to judgment as in an action for the recovery of possession of personal property.

[1] 2 R. S. (3d ed.) 519, § 1.

[2] First Rep. of Com. p. 168.

[3] Chapman *v.* Webb and Raymond, 6 How. Pr. R. 390. Per DALY, J.

But in M'Grath and Hasbrouck *v.* Van Wyck,[1] it was intimated that it would be irregular to amend a complaint for the recovery of personal property, by setting forth a cause of action as founded upon a promise to pay for the same goods. And in Houghton *v.* Latour,[2] the court refused to allow an amendment to be made to an answer by adding an entirely new ground of defence, for the reason that such amendment substantially changed the defence within the meaning of the Code. The same rule of amendment which applies to a complaint will, of course, apply to the counterclaim set up by way of defence.

In Wright *v.* Storms,[3] on a motion for leave to amend a complaint by changing parties, plaintiff, and defendant, the court was of opinion that it was not the intention of the Code that the power of amendment should be exercised to the extent of allowing an entire change of parties so as, in effect, to be a new suit. The plaintiff must discontinue his action and commence again. In most cases, however, in the discretion of the court, and "in furtherance of justice," parties may be added to, or stricken from, the pleadings at any time on terms.

But an amendment was allowed, claiming a larger amount of damages, even after a verified reply reiterating the amount claimed in the original complaint.[4]

[1] 2 Sand. 651.

[2] 10 L. O. 32.

[3] 3 C. R. 138, Special Term, per EDWARDS, J. See infra, remarks on the case of Dutcher *v.* Slack.

[4] Merchant *v.* N. Y. Life Ins. Co., 2 Sand. 669, and see also 1 C. R., N. S. 352.

In Brown *v.* Babcock, supra,[1] the pleadings were allowed to be amended by striking out a defendant, who had been erroneously joined, on payment of defendant's costs of suit and costs of opposing motion. In Bemis *v.* Bronson,[2] it appearing at the trial that there was no cause of action against one of the defendants, on a motion for non-suit, JUSTICE EDMONDS allowed the pleadings to be amended by striking out the defendant, on condition that plaintiff forthwith pay his costs or give security therefor. A similar decision was made by JUSTICE WATSON at the circuit,[3] who allowed, before trial, the name of a defendant sued as endorser, but who had not received notice of protest, to be struck out on payment of his costs, leaving the action to proceed against the maker.

In Dutcher *v.* Slack,[4] a party plaintiff was allowed to be added on motion, the court holding that an amendment as to parties might be made by the Code, "in furtherance of justice," provided only the amendment did *not change substantially the cause of action or defence.* The rule thus limited in its application was undoubtedly correct, as the Code then stood.[5] An amendment by the court being allowed in terms only "whenever the amendment shall not change substantially the cause of action or defence." As the Code now reads, however, this clause stands

[1] 3 How. Pr. R. 305, 1 C. R. 66.
[2] Beekman *v.* Cutler, not reported.
[3] 1 C. R. 27.
[4] 3 How. Pr. R. 322.
[5] § 149, original.

by itself, disjunctively, and it does not by proper grammatical construction, limit the power of amendment in cases of "adding or striking out the name of any party," or "correcting a mistake in the name of a party," or "a mistake in any other respect," or inserting other allegations material to the case." These four classes of amendments may now be made in the discretion of the court, in *furtherance of justice*, which, it seems, is the only limitation, and the sole enquiry on such an application. Within the language of this section, as it now stands, perhaps the amendment asked in Wright *v.* Storm, supra,[1] might have been properly allowed. In a partition case, JUSTICE WILLARD allowed a plaintiff to amend a defective complaint at the hearing, in conformity with the old equity practice, by adding and striking out parties, and making such other changes as might in consequence become necessary, on payment of costs to the party stricken out of the pleadings incurred subsequent to appearance,[2] and doubtless the same amendment might have been made on application before hearing. A mistake in the name of a party is not a ground of non-suit, but it can be amended at the trial or afterwards.[3]

A complaint was allowed to be amended by striking out the name of a party plaintiff, who had been discharged under the insolvent debtor act, after the cause had been referred, and some testimony taken therein, such plaintiff being required to pay

[1] Ante, page 506.

[2] Vandewerker *v.* Vandewerker, 7 Barb. S. C. R. 221, and see § 122 Am. Code.

[3] 9 Barb. S. C. R. 202.

the costs of the motion, and give security to pay his proportion of the costs which had already accrued, in case the defendant recovered judgment.[1] The name of a next friend in Forrest *v.* Forrest,[2] was allowed to be inserted in the pleadings by amendment. And it may be inserted, it seems, *nunc pro tunc* at any time.[3]

In respect to the correction of mistakes, either in the name of a party, or in any other respect, the utmost liberality is exercised by the court. An amendment will always be allowed which does not prejudice the substantial rights of the opposite party, the terms being usually payment of the costs of the motion.

With regard to the clause which allows an amendment "by inserting *other allegations material to the case*," it is very evident that this must be taken with many limitations and restrictions, and must be construed with other parts of the Code. A complaint defective for want of material allegations, that is, which does not state facts sufficient to constitute a cause of action, is bad on demurrer, and is not cured by a verdict. It cannot be supposed that after judgment, on appeal, the court would permit these material allegations to be added by way of amendment, so as to sustain the judgment. The clause may, perhaps, be properly construed as applying only to pleadings before trial. After that, such an amendment can very rarely be allowed "in furtherance of justice," or without prejudice to the substantial rights

[1] Davis *v.* Schermerhorn, 5 How. Pr. R. 440.

[2] 3 C. R. 254.

[3] 6 How. Pr. R. 396.

of the opposite party. It was so substantially decided in Roth *v.* Schloss,[1] where on the trial the plaintiff's counsel offered to prove a material fact not alleged in the complaint, and asked leave to amend, which was refused. Upon the motion in that case for a new trial, the court says: "This was not a case of *variance*. There was an omission in the complaint of the entire allegation offered to be proved. It was, therefore, a case under the 149th section,[2] and the motion should not have been granted, unless it had clearly appeared that to grant it would be '*in furtherance of justice*.' If it be admitted, that the fact offered to be proved was material for the plaintiff to establish, then that fact might be controverted by the defendant, which would require an amendment of the answer, and very likely, upon that new issue, it would be material to produce witnesses who were not then in attendance at the court."[3] The court, therefore, held the application to have been very properly denied.[4] It was further said, in that case, that the denial of a motion to amend, where the law reposes a *discretion in the judge*, is not an appropriate ground of exception.

Terms of amendment. The amendments indicated by the section under consideration, are all to be on "such terms as may be proper," that is, as the court in its discretion may think fit to impose. The costs

[1] 6 Barb. S. C. R. 308, at General Term, 5th District.

[2] Orig. Code.

[3] Per GRIDLEY, J.

[4] But see Executors of Keese *v.* Fullerton, 1 C. R. 52, where such an amendment was allowed on payment of the costs of trial, with leave to the defendants to answer in 20 days.

of the motion, if before trial, as we have already seen, is usually granted. But if the amendment is applied for after the cause is at issue and actually noticed for trial, the costs of the circuit, as well as the costs of opposing the motion, will be required to be paid;[1] or, if the name of an adverse party be struck out, his full costs up to the time of motion.[2] Sometimes also other terms will be imposed;[3] and see further, generally, as to terms of amendments, Brown *v.* Babcock, 3 How. Pr. R. 305.

I am next to consider:—

3. *Amendments by the court, either on the trial, on judgment rendered, or on motion of the adverse party.* The subject of amendments on the trial may also properly include amendments made after trial and verdict, or new trial ordered. I have already briefly noticed, when, and in what cases, under the old practice, amendment would be allowed to the pleadings after trial; and the rule is very similar under the new. An amendment will be permitted after trial, as under the former practice, by adding a new count to the declaration,[4] in a case commenced before the Code. And even after a non-suit, though the general rule is to the contrary, yet a plaintiff under peculiar circumstances may have leave to amend and have a new trial, in analogy with the former practice.[5] So held under the Code, in Balcom *v.* Woodruff,[6]

[1] Monell Pr. 42.

[2] 1 C. R. 27.

[3] 5 How. Pr. R. 440.

[4] Burnap *v.* Babcock, 1 C. R. 51. But not it is presumed by adding a distinct cause of action.

[5] 17 Wend. 75.

[6] 7 Barb. S. C. R. 14, at General Term, 5th District.

where a plaintiff had been non-suited at the circuit, on the ground that his declaration contained no count adapted to the nature of the case. It appearing that the defendant had not been misled; that the cause had been once tried without any objection having been made; that the statute of limitations had attached; and that such relief would be manifestly *in furtherance of justice*, the court allowed the plaintiff to amend his declaration, *nunc pro tunc*, and set aside the non-suit on payment of costs.

Amendments after trial, however, are allowed with great caution, and not unless upon good cause shown. It was very properly said in Houghton *v.* Skinner,[1] that, though the Code gives great latitude of discretion as to amendments, yet there must be some limit; and that in the exercise of discretion the old rules are safe guides, and must be followed, unless some very special reasons render their application unjust. In that case, after trial and verdict for plaintiff, a motion by defendant for leave to plead a former judgment against a co-defendant, the defendant having knowledge thereof before answer, was denied.

The N. Y. Superior Court allowed an amendment after trial by inserting in a complaint for slander words in German which were set out in English.[2] But this was really the case of an amendment *at* the trial, the motion having been made on leave granted at the trial to apply for liberty to amend *nunc pro tunc*. A similar amendment was held in the N. Y.

[1] 5 How. Pr. R. 420.

[2] Lettman *v.* Ritz, 3 Sand. 734.

Common Pleas to be admissible, and not a substantial change of the cause of action.[1]

In respect to amendments *at* the trial, I have already briefly noticed one or two cases in which they might be properly allowed, mainly with respect to adding or striking out the names of parties, and the terms upon which such amendments will be allowed.[2] From the case of Executors of Keese *v.* Fullerton,[3] it seems, that although the court may not at the trial absolutely dismiss a complaint when it does not contain material allegations sufficient, &c., but *may* suffer an amendment to be made on payment of costs; yet, from the subsequent case of Roth *v.* Schloss, cited above,[4] it appears that this can only be done under peculiar circumstances, and when it is clearly *in furtherance of justice.*

It was observed, ante, page 509, that the clause allowing an amendment to be made "by inserting other allegations material to the complaint," could not extend so far as to allow an amendment in aid of a judgment defective for want of such material allegations. Such a judgment must be reversed, even though the defendant has neglected to take the objection by demurrer.[5] But it is held that on the reversal of such a judgment, the plaintiff in such case, on payment of costs, may have leave to amend his complaint by inserting the material allegations, giving

[1] Debaix *v.* Lehind, 1 C. R., N. S. 235.

[2] Ante, pages 506 to 509, 5 How. Pr. R. 440, 1 C. R. 27, 7 Barb. S. C. R. 221.

[3] 1 C. R. 52.

[4] 6 Barb. S. C. R. 308.

[5] Rayner *v.* Clark, 7 Barb. S. C. R. 581.

the defendant the right of reply; thus placing both parties precisely in their former position.

And generally in the reversal of a judgment in all cases of erroneous pleading, or other defect, which would have been the subject of demurrer, had it appeared on the face of the pleading, the court will on granting a new trial, if the pleading is capable of being amended so as to show a good cause of action without changing the substance, allow it to be so amended on the terms of payment of all costs subsequent to the pleading.

So, too, on the decision of a demurrer either at General or Special Term, amendments are allowed with great liberality, either to the plaintiff's complaint or reply, or the defendant's answer. The latter part of section 172 of the amended Code, makes provision on this subject, as follows:

"After the decision of a demurrer, either at a General or a Special Term, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just. If the demurrer be allowed for the cause mentioned in the fifth subdivision of section 144, the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned."

The object of these provisions is sufficiently apparent. The discretion of the court in allowing the defendant to plead over on terms, is unlimited, save by the one restriction, that the demurrer must ap-

[1] 7 Barb. S. C. R. 584.

pear to have been interposed in good faith. As to this point, see further, ante, pages 431, 432.

An amendment of the plaintiff's complaint is also allowed on judgment against him upon a demurrer. The section above cited, specifies but the one case, that is, where several causes of action have been improperly joined, in which, instead of turning the plaintiff out of court, and leaving him to commence new actions, the court may *divide* the action on payment by the plaintiff, of defendant's costs. Judgment rendered against the plaintiff, on demurrer for some defect not going to the merits of the action, cannot be pleaded in bar to another action for the same demand.[1] It cannot, therefore, be absolutely necessary in all cases to allow an amendment on judgment against the plaintiff on demurrer; because, he may if he choose commence a new action. But instances occur in which it is not only proper, but absolutely necessary, to prevent a failure of justice, that an amendment should be allowed to the complaint after judgment against the plaintiff on demurrer.

Whenever such judgment might be pleaded in bar to another recovery, if the plaintiff otherwise shows a good cause of action, he should be allowed to amend. As, for example, when the complaint does not show that the plaintiff has legal capacity to sue, as a wife without next friend, or an infant without guardian. The same is true where the objection not appearing on the face of the complaint is taken by answer, and under the old practice would have been set up by plea in abatement. A verdict for defend-

[1] 1 Chit. Pl. 198, 4 Wend. 95.

ant in such cases, and judgment, ought not to be final, but the plaintiff, on showing a good cause of action, where the merits have not been enquired into on the trial, ought to be suffered to amend after verdict, and a new trial granted on payment of the costs. So, too, where the pleading is defective either for want of showing sufficient facts, mistake in parties, or for any other cause, and the statute of limitations, if the plaintiff is driven to a new action, will attach; in all such cases, he should, on proper terms, after verdict, or judgment on demurrer, be permitted to amend; at least to the extent that he was allowed to do under the former practice.[1]

On error, the court may make such amendment as could be made by the court below.[2] And where the defect is such as should have been amended in the court below, the court of appeals will not reverse a judgment overruling a demurrer for such cause.[3]

When an amendment cannot be made of course, it must be made by order of the court. A referee has no right to order an amendment, or to change the issue which the court has sent to him to be tried.[4]

Amendments are also made to the pleadings by the court on motion of the adverse party. This is under section 160 of the amended Code providing for striking out irrelevant and redundant matter; but as that subject has been already fully considered, it will

[1] See cases heretofore cited, and see Balcom *v.* Woodruff, 7 Barb. S. C. R. 13; Barnes *v.* Perine, 9 Id. 202; Willis *v.* Underhill, 6 How. Pr. R. 396.

[2] 7 John. 468. [3] 4 Coms. 276.

[4] Holmes *v.* Slocum, 1 C. R., N. S. 380.

not be necessary to pursue it further in this place.

The section also provides, that:—

"When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made more definite and certain by amendment."

This provision of the Code may be frequently resorted to with effect by the adverse party to correct a pleading which is ambiguous or unintelligible, or which, from the vagueness of its language, or its inartificial manner of statement, is either calculated to mislead the opposite party, or is not susceptible of a direct and positive answer. The motion may be very often effectively resorted to instead of a demurrer, and, indeed, in many cases, perhaps, it may be the only proper way to reach the objection. Thus, in case of an informal denial of the allegations of the complaint, or in case of an allegation in pleading which amounts to a *negative pregnant*, and which does not, therefore, constitute a direct and positive answer to the previous pleading,[1] or, where in an answer to a verified pleading the allegation may be construed in one sense to amount to a denial, but is susceptible of another construction making it an evasive answer, in all these cases, it is conceived, an application to correct the pleading will be entertained, and the party committing the fault, in analogy with the practice on granting motions to strike out redundant matter, will be held to pay the costs of the motion.

[1] See ante, page 485.

The language of the Code is, "where the allegations of a pleading are so *indefinite* or *uncertain*, that the precise nature of the charge or defence is not apparent." This, it is evident, is susceptible of a broad application; and the motion may be made to correct a pleading on this ground, not only in cases where a demurrer will not lie, but in many cases where a demurrer also would be proper.

What is *certainty* in a pleading has been already considered.[1] A former definition of the Code in regard to the statement of facts was, that it should be made "in such a manner as to enable a person of *common understanding* to know what is intended."[2] This language was found to be open to criticism, and it has not been retained by the later amendments. The only rule of certainty now indicated *in terms* by the Code is that the statement of facts must be "plain and concise;" or "in ordinary and concise language without repetition."[3] The former well established rules for the construction of pleadings, it is supposed, may still be serviceable as a test whether the pleading is *certain* and *definite* within the meaning of the Code.

[1] Ante, pages 441, 442.

[2] Code of 1849, § 142, 149, and 153.

[3] Same sections, Code 1851.

SECTION II.

VARIANCES BETWEEN PLEADING AND PROOF.

THE first three sections of that chapter of the Code relative to mistakes in pleading, and amendments, now under consideration, contain the provisions of the Code on the subject of variances. The first of these sections relates to *material variances* appearing in proof, defines what shall be deemed to constitute such variance, and provides a remedy. It is as follows:—

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. Whenever it shall be alleged, that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and, thereupon, the court may order the pleading to be amended, upon such terms as shall be just."[1]

The next succeeding section of this chapter provides for the case of an *immaterial variance*, and the manner of treating it, as follows:—

[1] Am. Code, § 169.

"When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs."[1]

The last of these sections is a definition of what shall be deemed a variance within the meaning of these provisions, and is in the following words:—

"Where, however, the allegation of the cause of action, or defence, to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, within the last two sections, but a failure of proof."[2]

This section, it is evident, is a material qualification to the one first above quoted, and limits the power of the court to order an amendment on the trial where the proof is defective, to those cases only in which some particular portion of the allegations is not sustained, but the cause of action or defence is otherwise substantially made out. If the whole fail, it is no case of variance, and there can be no amendment for the purposes of the trial. In such case, it seems, the plaintiff must be non-suited with costs, and the complaint dismissed, at least so far as the pending trial is concerned, unless it clearly appear to be *in furtherance of justice*, to allow the amendment;[3] or, if the complaint be not absolutely dismissed, that it stand over on payment of costs, allowing the defendant, if he wish it, to answer

[1] Am. Code, § 170.
[2] Am. Code, § 171.
[3] Roth *v.* Schloss, 6 Barb. S. C. R. 308.

the amended pleading, as was done in the cases of Fullerton *v.* Armstrong, and Bemis *v.* Brown.[1] Or, if the non-suit be actually granted, the amendment may, perhaps, be allowed afterwards on motion, with a new trial, under very special circumstances, within the case of Balcom *v.* Woodruff, before cited.[2]

In Roth *v.* Schloss,[3] an action brought under the Code, it was held that where the complaint omitted to set out an entire material allegation, the plaintiff could neither prove such fact on the trial, nor was it a case of *variance.*[4] It could not be *disregarded* or amended at the trial, unless under section 149,[5] when it clearly appeared to be *in furtherance of justice.*[6] And such an amendment, if allowed at all, could only be allowed on payment by the plaintiff of defendant's costs, leaving the case to stand over with permission to the defendant to answer the amended complaint. This would be in effect the same thing as dismissing the complaint, leaving the plaintiff to commence a new action; unless, indeed, an amendment was rendered necessary to save the statute of limitations. In such case, leave to amend might be granted on terms, either at the trial, or afterwards on motion.[7]

[1] 1 C. R. 52, 1 id. 27.

[2] At page 511.

[3] 6 Barb. S. C. R. 308.

[4] See remarks on this case, ante, page 510.

[5] § 173, Am. Code.

[6] But see a very early case under the Code, Wood *v.* Gilchrist, 1 C. R. 117, where a material allegation was allowed on the trial to be inserted in an action of slander, without payment of costs, it appearing that the defendant was not "misled."

[7] 7 Barb. S. C. R. 13.

A material variance between the pleading and the proof, is, as we have seen, defined by the Code, to be one which has "actually misled the adverse party, to his prejudice, in maintaining his action or defence upon the merits." If it have not so misled the adverse party, it may be amended without costs, or disregarded. Upon this subject, the reader is again referred to the sections of the Revised Statute above quoted.[1] Under the former practice, by statute, variances which could be amended by the court after verdict were disregarded upon the trial of a cause, "unless such variance or mistake be calculated to surprise and mislead the adverse party, and to prevent his making due preparation for a full answer on the merits, to the matter concerning which such variances or mistake shall have been made."[2] But the statute contemplated only the case of a *written instrument* erroneously recited, or referred to, or where a mistake occurred in *the name of any person, or officer*, or in stating *any day, month, or year*, or in *the description of any property*.[3] Yet, it was said, that, independent of the statute, within the limits thereof, amendments might be made, at the trial, of most variances between pleadings and proofs, where the action was founded on an oral contract or wrong.[4] These limits were, that the variance must be clerical or unimportant, and the court must be satisfied that the party objecting has not been surprised and misled by it, or prevented from making due preparation for a full defence on the merits.[5]

[1] Ante, pages 492, 493.

[2] 2 R. S. (3d ed.) page 504, § 98. [3] Id.

[4] 19 Wend. 542, Cow. & Hill's notes, 531, 532.

[5] 15 Wend. 672, 673, 17 id. 113, 19 id. 542, 543.

The application of the rule was held to be substantially as stated by JUDGE COWEN in his treatise,[1] that if the variance was such as not to have misled the party objecting, and, if, above all, he in fact have not been misled, there can be no reason why the merits should be shut out. On the other hand, if the variance had been so wide as palpably to throw the opposite party off his guard, or, if he have in consequence failed to prepare himself for trial, the variance becomes material, and should neither be overlooked nor amended. This was precisely the rule laid down in Roth *v.* Schloss, supra.

There is a marked similarity between the language of the statute above quoted, and that of the Code. The Code, however, is more definite and specific. The statute says, "if the variance or mistake *be calculated* to surprise and mislead," &c. The Code says, "unless it have *actually misled* the adverse party, to his prejudice," &c. Under the former practice, the party claiming to have been misled by the variance, *might* prove the fact to the court by his own oath or otherwise if desirable; or the court might determine the question from the appearance of things in the course of the action.[2] By the Code, a mere *assertion* that the party has been misled by a variance, will not, it seems, be sufficient to defeat an amendment upon terms, unless that fact "*be proved* to the satisfaction of the court," and also, in what respect the party has been misled. What the nature and character of this *proof* may be, will of course rest much in the discretion of the court. The Code seems to

[1] Cow. Treat. 939.

[2] Cow. Treat. 679, 690.

require *proof* in all cases,' but it does not appear to be necessary that the proof should be always sustained by the oath of the party; if it satisfactorily appear from the evidence already given, and the facts and circumstances which already appear in the cause, it will be sufficient.

It may be further observed under this head, that even where a case is not properly a case of *variance* under the Code, yet an amendment may be made to reach and cure the defect under the last clause of section 173, "when the amendment does not change substantially the claim or defence by conforming the pleading or proceedings to the facts proved." An amendment under this provision, it will be seen, is limited by the proviso that it shall not change the claim or defence. As to what will be regarded as a change of the claim or defence, vide pages 505 to 508. If the plaintiff claim legal relief when his proper relief is equitable, or if he claim equitable relief when his cause of action shows him to be entitled properly to legal relief, an amendment changing the claim for relief is no change of the cause of action. In such a case, it was said by JUSTICE PARKER, that he should certainly allow on the trial whatever amendment in the pleadings was necessary to administer complete justice in the case. And query, in a case like this, where the complaint does not demand the proper relief, whether an amendment is necessary within the provisions of section 275.

Immaterial variances may be disregarded entirely, and the fact found according to the evidence. Or

[1] Lettman *v.* Ritz, 3 Sand. 734.

the court may order an immediate amendment without costs.[1]

The rule embodied in this section was substantially the practice before the Code, as was well said by OAKLEY, Ch. J. in Depuyster *v.* Wheeler,[2] a case commenced before the Code. Objections of a technical character, he remarks, were of a class which the court was very much in the habit of disregarding before the Code was enacted: "We have usually given judgment in such cases without waiting for amendments to be made. If an amendment were deemed important, we left the party to apply for it on motion; and we imposed such terms on the party as we thought were proper when the motion was made. Indeed, variances generally have been either disregarded at the trial, or an amendment allowed at once. The judge at *nisi prius* can best determine whether there has been any surprise on the adverse party, or whether any injury is likely to result to him from his relying on the variance, or whether he ought to have relied on it at all." And it was declared that such would be the practice in that court for the future; namely, to disregard the variance without ordering an amendment, leaving the party to apply for it on motion if he deemed it prudent.

What constitutes an immaterial variance, which may be so disregarded on the trial, it is not so easy to determine. The Code in general terms defines it to be such as shall not "have actually misled the adverse party, to his prejudice, in maintaining his action or defence on the merits." Want of an allegation material to the cause of action, such as was

[1] Am. Code, § 69.

[2] 1 Sand. 719.

allowed to be inserted without payment of costs, in Wood *v.* Gilchrist,[1] cannot certainly be disregarded on the trial, and if so disregarded, a judgment entered thereon, would be reversed on appeal, because the complaint does not show facts sufficient to constitute a cause of action. And, indeed, it is doubtful if that case can be sustained in other respects within the decision in Roth *v.* Schloss, supra.[2] But where the complaint contains sufficient facts to sustain the action, or the answer sufficient to sustain the defence, if the cause of action or defence be substantially proved, the failure to prove certain allegations precisely as laid, will be disregarded. Thus in Lettman *v.* Ritz,[3] where the complaint in slander laid the words in English, and on the trial it was proved that they were spoken in German, the court for the purposes of the trial disregarded the variance, giving the plaintiff liberty, if he succeeded, to apply for an amendment on terms after the trial.

The rule that the *allegata* and the *probata* should correspond was, doubtless, more strictly enforced at common law, and even under the statute, than it will be under the Code. The rule was said to be both sound in principle, and well established in precedent. Thus in some cases at common law, *immaterial* averments, that is, averments which were not actually *impertinent as surplusage*, must, if laid in the declaration, be proved.[4] The rule is stated by Mr. Chitty to

[1] 1 C. R. 117.

[2] 6 Barb. S. C. R. 108.

[3] 3 Sand. 734.

[4] Gould's Pl. 160, 164. A distinction is made between an immaterial and an impertinent averment. The one *may* remain in

be, that every allegation in an inducement which is material, and not impertinent or foreign to the cause, and which *cannot be rejected as surplusage*, must be proved as alleged, and the rule was so adopted by the Supreme Court in Hess *v.* Fox,[1] as particularly applicable to written instruments. If, it was said, the averment cannot be stricken out as surplusage, it should be strictly stated and proved.

It is conceived that such a rule cannot properly be now applied. A failure to prove an immaterial averment cannot in general be a *material variance* at the trial, within the meaning of the Code, and will be disregarded. And so too, in respect to facts which a party *may*, but which he *need not* allege, as if he aver demand of payment of a promissory note, or account, before suit bought; or, in an action of trespass to lands, if he allege that the defendant *wilfully and maliciously* committed the trespass, a variance in the proof, by a failure to prove the *demand* in the one instance, and the malice in the other, will be disregarded. It is sufficient if the *substance of the issue is proved.* If the contract given in evidence agree in substance and legal effect with that stated in the declaration, the variance will not be regarded.

The rule in respect to variances, however, has often been very strictly, and even technically applied by the courts of this state. Thus in Bissel *v.* Drake,[2] in trover for a promissory note alleged to be worth $180, the note when produced appeared to be for

the pleadings; the other will be struck out. This distinction does not seem to be recognized under the Code.

[1] 10 Wend. 436, 437.

[2] 19 John. 66.

$360; held a fatal variance. In Lower *v.* Winters,[1] where the declaration was upon a promise to pay $100 for improvements upon lands, and the promise proved was to pay so much if the promissor obtained a contract for the land, the variance was held fatal. So where a contract was alleged as absolute to transport twenty tons, and the one proved was to transport fifteen or twenty tons.[2] And so if the declaration allege a consideration for the promise *additional* to the true one, the plaintiff will fail on the ground of variance.[3] So, too, under the former practice in pleading usury, either in an action at law, or when set up as a defence in a plea or answer in equity, the defendant was required strictly to prove the usurious agreement as stated, otherwise, he failed in his defence.

That a more liberal practice in cases of this description is introduced by the Code is manifest, from what was said in the late case of Fay *v.* Grimsteed,[4] namely, that now, on the trial, if the usurious agreement proved differ in its terms from that alleged in the answer, it will not be a failure of proof so as to entitle the plaintiff to a verdict, but a case of variance subject to amendment upon terms. And, generally, most cases of variance of a description similar to those above cited, will now either be disregarded on the trial, or be within the reach of an amendment. Very few of them could stand the test established by the Code, namely, that the variance must be proved to

[1] 7 Cow. 263.

[2] 3 Wend. 374.

[3] 3 Caines, 286, and see further as to cases of variance, Cow. and Hill, notes, pp. 503 to 513.

[4] 10 Barb. S. C. R. 321.

the satisfaction of the court, to be such as has "*actually misled* the adverse party to his prejudice in maintaining his action or defence upon the merits."

SECTION III.

DEFECTS IN PLEADING, WHEN AND HOW AIDED.

A DEFECT in pleading is aided by the Code as at common law, either by pleading over, by presumption after verdict, and by the statute, or provisions of the Code relative to amendments.

1. *By pleading over.*—This subject has been already incidentally considered, and an additional remark or two will be all that can be necessary. Section 144, cited ante, page 372, specifies the causes of demurrer to the complaint, if apparent on the face of the pleading, and if not so apparent, the objection is to be taken by answer. But if the objection be not taken by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.[1]

An objection to the jurisdiction, it has been before remarked, may be taken at any time. Such a defect can never be aided by pleading over.

[1] Am. Code, § 148.

Nor under the Code, as under the old system, will a defect in substance in the complaint be impliedly cured by the mere effect of pleading over.[1] The rule, it is presumed, applies also to an answer as well as to a complaint. Thus, if the defendant plead *accord* and do not show *satisfaction*, and the plaintiff merely deny the agreement, this traverse could not cure the fault in the plea; namely, the omission to show a *satisfaction* to the plaintiff in regard to the cause of action.[2] If, however, the adverse pleading expressly admit the fact which ought to have been stated in the defective pleading, and which is substantially incorrect in omitting it, the error becomes immaterial, as in the instance of a declaration in trespass for taking goods, omitting to show any title to, or possession of the goods, and the plea admits the defendant's possession.[3]

2. *By presumption or intendment after verdict.*— The court will after verdict presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings, was duly proved on the trial. It is to be observed, however, that this is not to be taken to mean that the court will by intendment after verdict supply material facts or allegations in the complaint, without which the complaint does not show a cause of action. This was expressly held otherwise under the Code in Rayner *v.* Clark, (7 Barb. S. C. R. 557.) Such allegations cannot be presumed to have been proved. But it seems the intendment after verdict under the Code, as under the old practice, is to be confined

[1] 7 Barb. S. C. R. 585. 6 id. 557. 10 id. 321.
[2] 1 Chit. Pl. 672. [3] Id.

solely to such allegations as can *be implied* from the allegations *on record*. A verdict will cure a *defective statement of title*, but will never cure a *defective title or cause of action*.[1]

It seems, too, to be still the rule that such intendment cannot apply to the case of a judgment on default. Where there has been no trial or verdict nothing can be *intended* or *presumed* in favor of the plaintiff. The judgment admits such facts only as are actually alleged.[2] A plaintiff by the Code cannot, on default, take any greater or other relief than that demanded in his complaint.[3] And it would certainly seem that the facts which he alleges in his complaint, must of themselves, without any presumption or intendment, show him entitled to that relief. The rule, however, should be held to extend only to substantial defects, matters of substance, and not of form, otherwise it will come within that class of defects which is aided.

3. *By the statute and Code relative to amendments.*—The statute of amendments has already been alluded to and partially quoted in a preceding part of this chapter.[4] It will not be necessary in this place further to consider its provisions, or its application to the present practice. If not abolished, it is practically superseded by the broader and more general provisions of the Code embodied in section 176:—

"The court shall, *in every stage of an action*, disregard any error or defect in the pleadings or proceedings which

[1] 1 Chit. Pl. 681, and see cases there cited.

[2] 1 Saund. 228, note 1.

[3] Am. Code, § 275.

[4] Ante, pages 492, 493.

shall not affect the substantial rights of the adverse party; and *no judgment shall be reversed or affected* by reason of such error or defect."

This, it is conceived, not only embraces in a single proposition the whole of the statute of *jeofails* and amendments, but goes something beyond, and may perhaps, aid cases which the statute could not reach. It was held in Vanderburgh *v.* Vanvalkenburgh,[1] that this section, though made applicable to existing suits, is not to be understood as making valid a bad pleading in a suit brought under the old practice when the defects complained of are made the ground of demurrer. Within the principle of this decision, it is presumed, that the section cannot aid a defect in such suit after judgment or verdict, but such defect must be determined by the rules and provisions of the statute.

In all other cases, however, this section of the Code applies. It furnishes a single test in all cases, a broad and universal test, namely, that if the defect is such as in the opinion of the court will not "*affect the substantial rights of the adverse party*," no matter in what that defect shall consist, the judgment will not be reversed or affected thereby. It is but applying to the action in its last stages, the rule which the Code designs to govern its commencement, and to regulate its proceedings throughout, namely, that the action is to be stated, tried, and determined on its merits alone, and that the substantial rights of the parties, and they alone, are to be regarded as controlling the administration of justice under the forms of law.

[1] 8 Barb. S. C. R. 217, General Term, 3d District.

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ERRATA.

On page 24, line 21, for the word "form" read "from."
Page 86, line 16, for "court" read "code."
Page 88, line 20, for word "reorganized" read "recognized."
Page 97 line 2, for word "consideration" read "consultation."
Page 99, line 10, for word "case" read "bill."
Page 113, line 13, for word "much" read "now."
Page 175, line 22, for "100," read "160."
Page 329, line 8, for word "their" read "these."
Same page, lines 17 and 18, for word "prevent" read "present."
Same page. after word "set" insert word "it."
Page 333, line 4. after word "set" insert word "off."
Same page. read "Radley" for "Rudley."
Page 339, line 7, for "causes" read "cases."
Page 343, line 6, for "discharged" read "discharge."
Page 350, line 8, for "in" read "on"
Page 352, line 11, for "complaint" read "compliance."
Same page, in line 22, read "Fabricotti *v.* Launitz."
Page 353. line 13, after words "reply may be" add word "to."
Page 356, line 1. in place of "report" read "set forth."
Page 360, line 25, for "Bralo" read "Beales."
Same page, line 2, for "345," read "332, 333."





RULES OF PRACTICE

OF THE

SUPREME COURT

OF THE

STATE OF NEW-YORK,

AS REVISED

BY THE JUSTICES ASSEMBLED IN GENERAL SESSION, AT THE CAPITOL IN THE CITY OF ALBANY, ON THE FIRST WEDNESDAY OF AUGUST, 1852, PURSUANT TO SECTION 470 OF THE CODE OF PROCEDURE.

CORRECTED EDITION,

COMPRISING THE TEXT CAREFULLY REVISED,

WITH

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EMBODYING REFERENCES TO THE CODE, THE FORMER RULES, AND TO ALL REPORTED DECISIONS, BEARING ON THE DIFFERENT PROVISIONS, DOWN TO THE DAY OF PUBLICATION.

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JUSTICES OF THE SUPREME COURT

OF THE

STATE OF NEW YORK,

AUGUST, 1852,

AND

THEIR PLACES OF RESIDENCE.

FIRST JUDICIAL DISTRICT.

Class	1.	John W. Edmonds,*	New-York.
"	2.	Henry P. Edwards, ...	"
"	3.	William Mitchell, ...	"
"	4.	James J. Roosevelt, ...	"

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"	1.	Nathan B. Morse, ...	Brooklyn.
"	2.	Seward Barculo, ...	Poughkeepsie.
"	3.	John W. Brown, ...	Newburgh.
"	4.	Selah B. Strong, ...	Setauket.

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"	2.	Amasa J. Parker, ...	Albany.
"	3.	William B. Wright, ...	Monticello.
"	4.	Ira Harris, ...	Albany.

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"	2.	Augustus C. Hand, ...	Elizabethtown.
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* Members of the Court of Appeals for 1852.

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"	2.	William F. Allen, ...	Oswego.
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"	4.	Daniel Pratt, ...	Syracuse.

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"	2.	Schuyler Crippen, ...	Cooperstown.
"	3.	William H. Shankland, ...	Syracuse.
"	4.	Hiram Gray, ...	Elmira.

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"	2.	Samuel L. Selden, ...	Rochester.
"	3.	Thomas A. Johnson, ...	Corning.
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"	2.	Richard P. Marvin, ...	Jamestown.
"	3.	James G. Hoyt, ...	Buffalo.
"	4.	James Mullett, ...	"

* Members of the Court of Appeals for 1852.

PUBLISHERS' NOTE.

THE delay in issuing the present edition of the Rules has r been greater than was necessary to render it perfect.

The edition already in the hands of the profession bears su undeniable marks of the haste with which it was issued, that more matured publication will doubtless be acceptable. T references there given, except such as have been borrowed, wit out acknowledgment, from the subscriber's edition of 1849, a cursory and most unsatisfactory. No notice whatever is taken the more recent and most important of the decided cases, whil the eight pages of index, given at the commencement, contain no less than from seventy to eighty material errors; many which are eminently calculated to perplex, at least, if not t mislead.

The recent revision of the Rules leaves the practice, in th main, as it stood; the changes effected being few, and compara tively unimportant. The most prominent features of that revisio are the limitation of the arguments of counsel, and the provision in relation to the numbering of separate heads of pleading, an as to the proper period of applications for a change of venue which define the future practice in those respects in accordanc with that which was rapidly gaining ground. Several mino changes have also been made, to which attention will be drawn in the Notes. One effect of the revision is, however, to change the number of the different Rules from No. 16 upwards. Nos. 17, 18, 24, 57 and 88, of 1849, are either wholly omitted or in-

corporated in others. Nos. 87, 88 and 89, of 1852, are newly inserted; and the concluding Rule now numbers 90, instead of 92. These different changes will be found duly noticed.

In the preparation of the present edition, copious additions have been made to the subscriber's original Notes of 1849, so as to comprise every reported decision bearing upon any of the Rules, down to the actual date of publication, including the cases in point in the 4th Sandford's and 10th Barbour's Reports. A carefully corrected index is likewise prefixed. The present pamphlet will therefore furnish what hitherto has not been furnished, viz., a complete and correct edition of the Rules, and a careful and matured synopsis of the cases in point.

Frequent references will be found to Mr. Whittaker's work on Pleadings and Practice under the Code, which, with the additions recently issued, embodying the effect of the changes above referred to, will be found to contain a complete summary of the past and present practice, and a complete and detailed analysis of the cases below referred to. The work itself is eminently calculated to supply the hitherto admitted want of a complete and reliable book of practice under the Code as it now stands.

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Rules of the Supreme Court.

Rules of the Supreme Court.

IN GENERAL SESSION OF THE JUSTICES

OF THE

SUPREME COURT, OF THE SUPERIOR COURT OF THE CITY OF NEW-YORK, AND OF THE COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW-YORK,

At the Capitol in the City of Albany, August 5, 1852.

[Code 1852, § 470.]

ORDERED *that the following Rules shall commence and take effect on the first day of October next:*

RULE 1.

Examination of attorneys.

Applicants for admission to practice as attorneys and counsellors of this court, who are entitled to examination, shall be examined in open court; the examination to commence on the first day of each general term.

Law rule of 1847, No. 1.

Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, is entitled to admission to practice in all the courts of this state. Const. of 1846, art. 6, § 8.

The examination can take place only at a general term. Sess. Laws of 1847, p. 343, § 75.

By Sess. Laws of 1847, p. 647, § 46, a person, though not admitted, was permitted to act as attorney and counsel, when specially authorized in writing, or nominated in open court. But this provision was held to be unconstitutional. Bullard vs. Van Tassel, 8 How. Sp. T. R., 402. Id., 169, 397. Devries vs. McKoan, 1 Code Rep., 6. This last conclusion seems, however, to be open to doubt. 1 C. R., 106. 5 Barb. S. C. R., 169. See subject considered in Practice and Pleadings under the Codes, p. 9 to 11.

RULE 2.

To entitle an applicant to an examination, he must prove to the court:

Proof of citizenship age and residence.

1. That he is a citizen of the United States and that he is twenty-one years of age, and a resident of the district in which he applies, which proof may be made by his own affidavit of the fact.

Of good moral character.

2. The evidence of good moral character shall be the certificate of a reputable counsellor of this court, or of some other reputable person known to the court; but such certificate shall not be deemed conclusive evidence, and the court must be satisfied on the point, after a full examination and inquiry.

The statute requires the court to provide, by general rule, what shall be sufficient proof of good moral character. Sess. Laws of 1847, p. 343, § 75. 2 R. S., 287.

RULE 3.

Where papers shall be filed.

Papers shall be filed in the office of the clerk of the county specified in the complaint as the place of trial. And in case the place of trial is changed for the reason that the proper county is not specified, as required by section 129 of the Code, papers on file at the time of the order making such change, shall be transferred to the county specified in such order; and all other papers in the cause shall be filed in the county so specified.

Law rule No. 5. Equity rule No. 41. Judiciary Act of 1847, §§ 50, 56, 57. 3 How. Pr. R., 276. As to place of trial, see Code, § 123 to § 127. As to change of place of trial, see Practice and Pleadings under Codes, 233 to 236, 319 to 326.

RULE 4.

What books to be kept by clerks.

The several clerks of this court shall keep in their respective offices, in addition to the "judgment book," required to be kept by § 279 of the Code of Procedure, such other books, properly indexed, as may be necessary to enter the title of civil actions and special proceedings, and the steps taken therein; to enter the minutes of the court; docket judgments; enter orders and all other necessary matters and proceedings; and such other books as the courts of the respective districts, at a general term, may direct.

Equity rule, 1. Law rule, 6. Decree required to be docketed, 2 R. S., 181, § 93. Judgment do. 2 R. S., 361, §§ 12, 13. Not a lien unless docketed in the county where the lands are situate. Laws of 1840, p. 334, § 25. Clerk to provide books. Id., p. 335, § 34. Judgment declared a lien from the time of docketing. Code, § 282. See Practice and Pleadings, pp. 441 and 444 to 448.

RULE 5.

Attorney's name and residence to be endorsed on papers served.

On process or papers to be served, the attorney, besides subscribing or endorsing his name, shall add thereto his place of residence; and if he shall neglect to do so, papers may be served on him through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence.

This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

Law rule, 8. Equity rule, 42. Where plaintiff's attorney failed to endorse his place of residence on the copy declaration served, his default was set aside as irregular. 2 How. Pr. R., 28. 5 How., 387. Practice and Pleadings, p. 124.

RULE 6.

How return by sheriff compelled.

At any time after the day when it is the duty of the sheriff or other officer, to return, deliver or file any process, undertaking, order, or other paper, by the provisions of the Code of Procedure, any party entitled to have such act done, may serve on the officer a notice to return, deliver or file such process, undertaking, order, or other paper, as the case may be, within ten days; or show cause at a special term to be designated in said notice, why an attachment should not issue against him.

Law rule, 18. Duty of sheriff pointed out. Code, §§ 183, 217. Proof of service of complaint, when not answered, is made part of judgment roll. Code, § 281. Existing provisions of law to enforce performance of duty by officer, continued in force. Code, § 291. See, as to sheriff's liability, 4 How., 297. 6 Id., 73. 4 Comst., 173. Practice and Pleadings, p. 8. Id., 511. As to his liability on arrest and bail given, Code 201, 208. Practice and Pleadings, 653, 654.

RULE 7.

Notice of appearance or retainer deemed an appearance.

Service of notice of an appearance or retainer generally, by an attorney for the defendant, shall in all cases be deemed an appearance. And the plaintiff, on filing such notice at any time thereafter, may have the appearance of the defendant entered, as of the time when such notice was served.

Law rule, 25. Code, §§ 246, 180, 188. 1 Code Rep., 127. Defective papers should be immediately returned, or notice given that they will be disregarded. 3 How. Pr. R., 64, 246. 1 Id., 240. 2 Id., 146. Practice and Pleadings, pp. 222, 453, 454.

RULE 8.

When discovery compelled of books, papers and documents

Applications may be made, in the manner provided by law, to compel the production and discovery of books, papers and documents relating to the merits of any civil action pending in this court, or of any defence in such action, in the following cases:

1. By the plaintiff to compel the discovery of books, papers or documents in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to frame his complaint, or to answer any pleading of the defendant.

2. The plaintiff may be compelled to make the like discovery of books, papers or documents, when the same shall be necessary to enable the defendant to answer any pleading of the plaintiff.

Law rule, 27. 2 Rev. Stat., 199, 200. Code, § 388. Discovery is not confined to cases in which it is necessary for the purpose of pleading. It may be had where one party desires to ascertain what documentary evidence his adversary holds, upon which he is relying to sustain himself upon the trial. Powers vs. Elmendorf, 4 How. P. R., 60. 2 C. R., 44.

It is not a matter of course to grant an order for discovery. It will not be granted where there has been gross negligence, or bad faith, or want of due diligence. Hooker vs. Matthews, 3 How. Pr. R., 329. Bowne vs. Cribb, 20 Wend., 682. Cow. & Hill's notes, 1178, 1198. Jackson vs. Ives, 22 Wend., 637. 1 Code Rep., 108. 3 How., 303. 1 C. R., 65. 2 Sandf., 662, 664. 4 How., 280. 2 C. R., 46, 148. 5 How., 160; 3 Id., 360. 2 C. R., 66, 87. 5 How., 451. 1 C. R. N. S., 146. 2 C. R., 88. 2 Sandf., 672; 3 Id., 741. 1 C. R. N. S., 214. 4 Comst., 247. See subject fully considered, Practice and Pleadings, chap. 6 of book 7, pp. 347 to 355.

RULE 9.

Application how to be made

The petition for such discovery shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit, stating that the books, papers and documents whereof discovery is sought, are not in the possession, nor under the control of the party applying therefor, and that the party making such affidavit is advised by his counsel, and verily believes, that the discovery of the books, papers or documents mentioned in such petition, is necessary to enable him to draw his complaint, answer, demurrer or reply, or to prepare for trial, as the case may be.

Law rule, 28. Code, § 388. 2 Rev. Stat., 199. 18 Wend., 529.

Application for a discovery of books and papers may be made in the same manner as under the Revised Statutes, before the Code took effect. Follett vs. Weed, 3 How. Pr. R., 308. Id., 360. 1 Code Rep., 66. See cases collected and references under rule 8.

RULE 10.

What order for discovery shall contain.

The order granting the discovery shall specify the mode in which the same is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or, by requiring him to produce and deposit the same with the clerk of the county in which the trial is to be had, unless otherwise directed in the order. The order shall also specify the time within which the discovery is to be made. And when papers are required to be deposited, the order shall specify the time that the deposit shall continue.

Law rule, 29. Code, § 888. 7 Wend., 536. 2 Denio, 187. 4 Wend., 196. See cases collected, and references under rule 8.

RULE 11.

Order to be a stay of proceedings.

The order directing the discovery of books, papers or documents, shall operate as a stay of all other proceedings in the cause, until such order shall have been complied with or vacated; and the party obtaining such order, after the same shall be complied with or vacated, shall have the like time to prepare his complaint, answer, reply or demurrer, to which he was entitled at the making of the order. But the justice, in granting the order, may limit its effect by declaring how far it shall operate as a stay of proceedings.

Law rule, 30. Code, § 888. See note to rule 8.

RULE 12.

When inquest may be taken.

Inquests may be taken in actions out of their order on the calendar, in cases in which they were heretofore allowed at the opening of the court, on any day after the first day of the court, provided the intention to take an inquest is expressed in the notice of trial, and a sufficient affidavit of merits shall not have been filed and served.

Law rule, 31. 2 Cowen, 581. 1 Wend., 77, 78, 287; 2 id., 244, 245; 5 id., 106, 563; 9 id., 451; 12 id., 198; 18 id., 656, 657; 19 id., 125. 2 Hill, 359; id., 409; 6 id., 368. 1 How. Pr. Rep., 23, 26, 40, 45, 62, 206. 1 Hill, 101.

Jones vs. Russell, 3 How. Pr. Rep., 324. 1 Code Rep., 118.
An affidavit of merits, that defendant stated to his counsel the facts of "his defence," instead of "the case," is insufficient. Richards vs. Sweitzer, 1 Code Rep., 118. 3 How., 413. Rule 86.
An inquest taken by reason of defendant's default to put in an affidavit of merits will not be set aside, where it appears that the answer was insufficient or frivolous. 1 Code Rep., 118.
As to affidavit of merits, vide 1 Sandf., 721. 6 L. O., 365. 1 C. R., 50, 81, 83, 118. 5 How., 14; 6 id., 6. 1 C. R. N. S., 400. 5 How., 288; 6 id., 296. 3 C. R., 214. 5 How., 288. 2 Sandf., 678. 2 C. R., 90. See also subject considered and cases cited, Practice and Pleadings, pp. 342 to 344.
As to inquest, vide 2 C. R., 2. 4 How., 15. 1 C. R., 83. 6 How., 118. 1 C. R. N. S., 407. 3 Sandf., 653. See subject fully considered, Practice and Pleadings, chap. 3 of book 8, pp. 382 to 385.

RULE 13.

Limitations as to counsel on trial.

On the trial of *issues of fact*, one counsel on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the cause, unless the justice who holds the court shall otherwise order.

This rule is now extended to the trial of all issues of fact, whether by the court or by a jury. By those of 1849, it was restricted to trials at the circuit.

RULE 14.

Hearing of counsel.

At the hearing of causes at a general or special term, not more than one counsel shall be heard, on each side, *and then not more than two hours each*, except when the court shall otherwise order.

Like rule 12 of Court of Appeals.

The two hours limitation has been inserted on the recent revision, in analogy with the practice of the Supreme Court of the United States adopted in 1849.

RULE 15.

Making and settling a case.

Whenever it shall be intended to move for a review upon the evidence appearing on the trial, when the cause is tried by the court *or referee*, or to set aside a nonsuit, *dismissal of the complaint* or verdict (except for irregularity, surprise *or upon the minutes of the judge*), a case shall be prepared by the party intending to make the motion, and a copy thereof shall be served on the opposite party, within ten days after the trial, or notice of the judgment, as the case may be, who may, within ten days

thereafter, prepare amendments thereto, and serve a copy on the party who prepared the case, who may then, within four days thereafter, serve the opposite party with a notice to appear within a convenient time, before the justice *or referee* who tried the cause, to have the case and amendments settled. The justice *or referee* shall thereupon correct and settle the case, as he shall deem to consist with the truth of the facts. The time for settling the case must be specified in the notice, and it shall not be less than four, nor more than twenty days after service of such notice. The lines of the case shall be so numbered that each copy shall correspond.

Cases reserved for argument, and special verdict, shall be settled in the same manner.

Law rule, 33. Code, §§ 265, 268. 5 Wend., 103. 7 Id., 488. Thompson vs. Blanchard, 3 Howard's Sp. Term Rep., 399. See Code, §§ 264, 265, 268. This rule, as now altered, incorporates the substance of rules 17, 18 and 24, of 1849.

The practice on the subject of new trials in general will be found fully defined, and upwards of fifty recent cases, bearing on the subject, cited in Practice and Pleadings, chap. 7, book 8, pages 411 to 429. See also subsequent cases, 10 Barb. S. C. R., 98, 303, 321, 406, 447, 512, 663. The portion of the chapter of Practice and Pleadings, above cited, more peculiarly bearing on the formal preparation and settlement of a case, will be found at pp. 419 to 421.

RULE 16.

Right to make a case how waived, and when case deemed settled.

If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the justice or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed.

Law rule, 34. See reference under rule 15.

N. B. From this point the numbers of the rules have been changed on the recent revision. The numbers of 1849 will, therefore, be subjoined in each case within brackets.

RULE 17. [19.]

Exceptions or case to be filed.

Where a party makes a case or exceptions, he shall procure the same to be filed, within ten days after the same shall be settled, or it shall be deemed abandoned.

Code, §§ 264, 265, 272, 281. Slightly changed in phraseology, in accordance with amendments in Code, § 264. Vide Practice and Pleadings, p. 428.

RULE 18. [20.]

Case, how turned into a special verdict or exceptions

When a party shall be entitled to turn a case into a special verdict, or exceptions, he shall have thirty days after notice of the decision thereon, to prepare and serve such special verdict or exceptions. The party upon whom the same shall be served, shall have twenty days to prepare and serve amendments; and in case such amendments shall not be agreed to, the same shall be settled by one of the justices of the court, on a notice to be given within ten days after service of such amendments.

Law rule, 39. 8 Cowen, 406. Vide Code, § 264.
A case cannot be turned into a bill of exceptions, except on stipulation between the parties. Masters vs. Bailey, 1 Howard's Pr. R., 42. Vide 1 Comst., 592. 2 Comst., 189, 406. 3 Comst., 327. See Practice and Pleadings, p. 432.

RULE 19. [21.]

Effect of not serving papers within the time prescribed.

In case such special verdict or exceptions shall not be served within the said thirty days, the prevailing party shall be at liberty to proceed as though no special verdict or exceptions had been taken. And in case no amendment shall be proposed and served within the twenty days allowed for that purpose, the special verdict or exceptions shall be deemed assented to, as proposed and served.

Law rule, 40.
When an amendment of a bill of exceptions will be allowed. 1 How. Pr. R., 226.

RULE 20. [22.]

When plaintiff may stipu-

Whenever the plaintiff shall have neglected to bring his cause to trial according to the practice of the court, and the

same shall not have been noticed by the defendant, the plaintiff may, if he have not before stipulated, tender a stipulation and offer to pay the costs to which the defendant is entitled, up to that time. late to t cause.

Law rule, 41. 6 Wend., 521. 25 id., 688. 18 id., 519. 19 id., 689. 20 id., 679.
An offer of costs, on stipulating to try cause, should be made to the defendant's attorney, not to his counsel. Shattuck vs. Chamberlin, 4 Cowen, 14.
A plaintiff will be allowed to stipulate, although the defendant is a prisoner on the limits. Parkin vs. Stevenson, 10 Wend., 620.
After one stipulation, a defendant is not bound at his peril to accept a second, although furnished with the excuse of the plaintiff; he may insist upon submitting the sufficiency of his excuse to the court. Farnam vs. McClure, 7 Wend., 488.
Where the plaintiff has brought the cause to trial pursuant to a stipulation, and the verdict is set aside, and another circuit has passed, he may stipulate again. Baldwin vs. Tillson, 1 Denio, 621. 1 Howard's Pr. R., 173. Vide Practice and Pleadings, pp. 846, 885.

RULE 21. [23.]

Whenever an issue of fact shall have been joined, in any action, and the plaintiff therein shall fail to bring the same to trial, according to the course and practice of the court, the defendant may move for the dismissal of the complaint, with costs. Dismissal of complaint for not bringing cause to trial.

If it is made to appear to the court that the neglect of the plaintiff to bring the action to trial was not unreasonable, the court shall permit the plaintiff, on payment of costs, to bring the said action to trial at the next court where the same is triable.

Law rules, 41, 42. Code, § 274.
Where a party stipulates to try a cause at the *next* circuit, and there be not sufficient time regularly to notice the cause for trial at the circuit immediately succeeding, the stipulation will be considered as applying to the second circuit. Jackson vs. The Phœnix Bank, 5 Wend., 101.
1 How. Pr. R., 6, 10, 33, 39, 40, 53. 2 How. Pr. R., 39, 72, 119, 135, 199, 275. 3 How. Pr. R., 47, 142. Vide Practice and Pleadings, pp. 881, 882.

RULE 22. [25.]

On a hearing before referees, the plaintiff may submit to a nonsuit *or dismissal of his complaint* or may be nonsuited *or his complaint be dismissed* in like manner as upon a trial, at any time before the cause has been finally submitted to the referees for their decision. In which case the referees shall report according to the fact, and judgment may thereupon be perfected by the defendant. Plaintiff may submit to a nonsuit or dismissal before referees.

Law rule, 45. Power to submit to a dismissal inserted on recent revision. See subject fully considered, Practice and Pleadings, pp. 405, 406. Vide 6 How., 217; 1 C. R. N. S., 358, 380, there cited.

RULE 23. [26.]

Plaintiff need not be called on receiving verdict

It shall not be necessary to call the plaintiff when the jury return to the bar to deliver their verdict; and the plaintiff shall have no right to submit to a nonsuit after the jury have gone from the bar to consider of their verdict.

Law rule, 46. Previous to the rules adopted by the late Sup. Court, in 1845, a verdict could be set aside as irregular if it was received without calling the plaintiff. Gale vs. Hoysradt, 7 Hill, 177. Vide Practice and Pleadings, p. 392.

RULE 24. [27.]

Exceptions to contain no irrelevant evidence.

Exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which the same were taken on the trial; and it shall be the duty of the justice, upon settlement, to strike out all the evidence and other matters which shall not have been necessarily inserted.

Law rule, 47. Vide Code, § 264. Practice and Pleadings, pp. 426 to 428. 3 Comst., 222. 9 Barb. S. C. R., 271. 6 Barb., 330. 2 Sandf., 732. 6 Barb., 557.

RULE 25. [28.]

Notices of argument or of motion, and defaults thereon.

All questions for argument, and all motions, shall be brought before the court on a notice *or order to show cause*, and if the opposite party shall not appear to oppose, the party making the motion *or obtaining the order*, shall be entitled to the rule or judgment moved for, on proof of due service of the notice *or order* and papers required to be served by him, unless the court shall otherwise direct.

Must specify irregularities if any complained of.

And when the motion is for irregularity, the notice or order shall specify the irregularity complained of.

Judgment by default not admissible in divorce cases.

This rule, so far as it permits a judgment by default, or by the consent of the adverse party, shall not extend to a complaint for a divorce.

Law rule, 48. Rules of Court of Appeals, 11 and 15. Code, §§ 256, 258, 402, 412, 413. 2 R. S., 144, § 36. Id., 145, §§ 40, 41. Rules, 68 to 72. 1 Code Rep., 115. Proceeding by order to show cause, formally recognized on last revision. Vide Practice and Pleadings, pp. 187, 188. Provision as to notice on ground of irregularity, new. See Practice and Pleadings, pp. 189, 140, and cases there cited, especially 2 C. R., 79. See recent cases, 4 Sandf., 641. 684.

RULE 26. [29.]

When a rule is obtained either at a general or special term, by default, the counsel obtaining the same shall endorse his name as counsel on the paper containing the proof of notice; and the clerk, in entering the rule, shall specify the name of such counsel. Counsel to endorse his name on proof of notice.

Law rule, 78.

RULE 27. [30.]

Enumerated motions are, motions arising on special verdict; issues of law; cases; appeals from an inferior court; and appeals by virtue of § 348 of the Code. What are enumerated motions.

Non-enumerated motions include all other questions, submitted to the court, and shall be heard at special term, except when otherwise directed by law. Non-enumerated motions.

Law rule, 49. Code, §§ 344 to 350. This rule has been much abbreviated on the recent revision, as to enumerated motions. See Practice and Pleadings, 89, 130, 378 to 380, and book 11, chaps. 5 and 6, pp. 575 to 582. As to non-enumerated motions, see same work, pp. 130 to 141.

RULE 28. [31.]

Enumerated motions shall be noticed for the first day of term by either party. Enumerated motions noticed for first day of term.

The papers to be furnished on such motions, shall be a copy of the pleadings, when the question arises on the pleadings, or any part thereof, or of such parts only as relate to the question raised by the demurrer; a copy of the special verdict, return, or other papers on which the question arises, and the party whose duty it is to furnish the papers shall serve a copy on the opposite party, *except upon trial of issues of law*, at least eight days before the time the matter may be noticed for argument. If the party whose duty it is to furnish the papers, shall neglect to do so, the opposite party shall be entitled to move, on affidavit and notice of motion, that the cause be struck from the calendar (whichever party may have noticed it for argu- Papers to be furnished.

ment), and that judgment be rendered in his favor; provided, however, that in mortgage and partition cases, where the plaintiff's rights are not contested, no copies of pleadings need be furnished to the court.

And by whom.

The papers shall be furnished by the plaintiff, when the question arises on special verdict, and by the party demurring, in cases of demurrer, *and in all other cases by the party making the motion.*

Cases reserved.

In cases reserved by the court for argument, in pursuance of §§ 264, 265, of the Code, no case need be prepared in writing, unless by the direction of the justice who tried the cause. And the party on whose motion the case is reserved shall furnish the papers for argument.

Law rule, 50. Equity rules, 71 and 72. Abbreviated on recent revision. See references, in note to rule 27.

RULE 29. [32.]

What papers to be furnished on appeal, and by whom.

When an appeal is noticed for a general term, in cases embraced in chapter 3 of title 11 of the Code, and of § 348 of the Code, the appellant shall furnish the papers for the court, which consist of a certified copy of the judgment roll, together with a case, stating the time of the commencement of the suit, and of the service of the respective pleadings, the names of the original parties in full, the change of parties, if any has taken place, pending the suit; and a very brief history of the proceedings in the cause; and containing an abstract of the pleadings, not exceeding one-sixth of the number of folios contained in the original pleadings respectively, to which shall be added the reasons of the court below for its judgment, if the same can be procured. At the commencement of the argument the appellant shall furnish a printed copy of the papers to each of the judges, together with a printed copy of the points on which he intends to rely, with a reference to the authorities which he intends to cite; and he shall also deliver to the attorney of the adverse party, at or before noticing

To be printed.

the said appeal for trial, three printed copies of the said papers. And at the commencement of the argument, each party shall serve upon his adversary, a printed copy of his points and authorities on which he intends to rely. In case the appellant neglects so to furnish to the adverse party the said number of copies of the papers, the latter shall be entitled to move, on affidavit and notice of motion, for the earliest practicable day in term for hearing non-enumerated motions, that the cause be stricken from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor.

When a case is agreed upon by the parties according to § 372 of the Code, the plaintiff shall furnish the necessary papers for argument, duly printed as in cases of appeal.

Law rules, 50 and 55. Equity rules, 69 and 71. Rules of the Court of Appeals, 5 and 9. As to preparation, printing and service of cases and points, see Practice and Pleadings, 562 to 564. Abbreviated on recent revision.

RULE 30. [33.]

How cases points, &c. to be printed.

The cases and points, and all other papers furnished to this court at a general term in calendar causes, shall be printed on white writing paper, with a margin on the outer edge of the leaf not less than one and a half inch wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and a half inches wide. The folio numbering from the commencement to the end of the papers, shall be printed on the outer margin of the page.

Folio how numbered and printed.

Law rule, 55. Rule 6 of the Court of Appeals.
The expense of printing papers on appeal is taxable as a disbursement. Code, § 311. The price of such printing is not fixed by statute. The rate charged at Albany is 1 cent per folio if 12 copies are printed, and three-fourths of a cent per folio for 20 copies.—Munsell's circular. See reference, on note to rule 29.

RULE 31. [34.]

Leading facts to be stated on points.

In cases where it may be necessary for the court to go into an extended examination of evidence, each party shall briefly state upon his printed points, the leading facts

which he deems established, with a reference to the folios where the evidence of such facts may be found.

Rules of Court of Appeals, 10. The restriction imposed in 1849, that "the court will not hear an extended discussion upon any mere question of fact," omitted on recent revision.

RULE 32. [35.]

Non-enumerated motions except in 1st district to be noticed for the first day of the term, or excuse to be shown.

Non-enumerated motions *except in the first district*, shall be noticed for the first day of the term or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made; and the notice shall not be for a later day, unless sufficient cause be shown (and contained in the affidavits served) for not giving notice for the first day.

Law rule, 57. Notice of motion must be served eight days before the time appointed for the hearing. Code, § 402.

A special motion should be noticed for the special term first to be held in the county where it can be made, whether in the county where the proceedings are pending, or in an adjoining county. 3 How. Pr. R., 71. Id., 186. See Practice and Pleadings, p. 189. The inconsistency in the Rules of 1849, there referred to, in relation to motions in the 1st district, has now been cured. See additions to that work, as recently issued.

RULE 33. [36.]

On what days in general term, non-enumerated motions will be heard.

Non-enumerated motions made in term time, at a general term, will be heard on the first day, and Thursday of the first week, and Friday of the second week of the term, immediately after the opening of the court on that day.

Motions in criminal cases may be heard on any day in term.

Law rule, 57. 4 How. Pr. R., 28.

The affidavits to support a motion must show affirmatively that the motion is made in the proper district or county. 1 Code Rep., 18. Id., 123.

RULE 34. [37.]

Time for filing notes of issue. Calendar for general term.

Notes of issue for the general term shall be filed *four* days before the commencement of the court at which the causes may be noticed. *The clerk shall prepare a calendar for the general term, and cause the same to be printed for each of the justices holding the court. Appeals shall be placed on the calendar according to the date of the*

Date of

service of the notice of appeal; and other cases as of the time when the question to be reviewed arose. Issue on appeal.

4 How. Pr. R., 26. Code, § 256, provides that the note of issue shall contain the title of the action, the names of the attorneys, and the time when the last pleading was served; and directs the clerk to enter the cause upon the calendar according to the date of the issue.

N. B. This rule has been much altered on the recent revision. The practice on filing notes of issue is now assimilated to that at special term. Vide Practice and Pleadings, pp. 339, 340 and 520, and additions, as recently issued. The date of issue on appeals is now defined. Vide rule 51 of 1847. Practice and Pleadings, Addition, p. 340.

RULE 35. [38.]

In all cases where a motion shall be granted on payment of costs, or on the performance of any condition, or where the order shall require such payment or performance, the party whose duty it shall be to comply therewith, shall have twenty days for that purpose, unless otherwise directed in the order. But where costs to be taxed are to be paid, the party shall have fifteen days to comply with the rule after the costs shall have been taxed on notice, unless otherwise ordered. Time for complying with orders.

Vide 4 Sandf., 674.

RULE 36. [39.]

Whenever it shall be necessary, in any affidavit to swear to the advice of counsel, the party shall, in addition to what has usually been inserted, swear that he has fully and fairly stated the case to his counsel, and shall give the name and place of residence of such counsel. How advice of counsel to be stated in an affidavit.

Law rule, 62. Where it appeared by the affidavit that the defendant had stated to his counsel the facts of "his defence," instead of "the case," it was held insufficient. 1 Code Rep., 118. 4 Hill, 64, note. 2 Hill, 359. 22 Wend., 636.
As to form of affidavit of merits, see 9 Wend., 444. 19 id., 98. 4 Hill, 534. 1 Hill, 644, 668. 19 Wend., 617. 2 How. Pr. R., 27, 38, 70, 75, 137, 195. 3 How. Pr. R., 418. See numerous references on the subject of affidavit of merits, as given before, in note to rule 12.

RULE 37. [40.]

No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced Agreements relative to proceed-

ings must be in writing or be entered as orders.

to the form of an order by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party, against whom the same shall be alleged, or by his attorney or counsel.

Law rule, 64. Equity rule, 84. 1 Hill, 627. 1 How. Pr. R., 169. 2 id., 44, 71, 80. The attorney may waive, by parol, the service of a paper or any formal requisite in its service. Such *waiver* is not an *agreement*. 8 Cowen, 119. See Practice and Pleadings, p. 127. See also case, 6 How., 326, in which, notwithstanding this rule, a *verbal* agreement was enforced, under the peculiar circumstances.

RULE 38. [41.]

Orders granted on petitions need not recite contents.

May be docketed as judgments in certain cases.

Orders granted on petitions, or relating thereto, shall refer to such petitions by the names and descriptions of the petitioners, and the date of the petitions, if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily. Any order or judgment, directing the payment of money, or affecting the title to property, if founded on petition where no complaint is filed, may, at the request of any party interested, be enrolled and docketed as other judgments.

Equity rule, No. 40. See Practice and Pleadings, p. 143.

RULE 39. [42.]

Motions may be by petition or affidavit or by both.

Motions in actions, made after the commencement thereof, may be founded upon petition duly verified, or by affidavit, or by both, at the election of the party making such motions, except when otherwise provided by law.

An application for an order is a motion. Code, 401. See Practice and Pleadings, pp. 142, 143.

N. B. Petition the proper course of proceeding on application for discovery. Vide Practice and Pleadings, 143, 352, 353. 5 How., 451. 1 C. R. N. S., 146.

RULE 40. [43.]

Motions for irrelevancy, redundancy or uncertainty of pleadings.

Motions to strike out of any pleading, matter alleged to be irrelevant or redundant, and motions to correct a pleading, on the ground of its being "so indefinite or uncertain, that the precise nature of the charge or defence is not apparent," must be noticed, before demurring or answering

the pleading, and within twenty days from the service thereof.

Code, § 402. See Practice and Pleadings, chap. 4, book 5, and upwards of 50 recent cases there cited, from p. 181 to p. 189. See recent case, 6 How., 475.

RULE 41. [44.]

Folios to be numbered.

The attorney or other officer of the court who draws any pleading, deposition, case, bill of exceptions or report, or enters any judgment exceeding two folios in length, shall distinctly number and mark each folio in the margin thereof; and all copies either for the parties or the court, shall be numbered or marked in the margin, so as to conform to the original draft or entry, and to each other. And all the pleadings and other proceedings, and copies thereof, shall be fairly and legibly written, and if not so written, the clerks shall not file such as may be offered to them for that purpose.

Pleadings to be legibly written.

Equity rule, 74.

RULE 42. [45.]

Certiorari to remove interlocutory proceedings, when heard.

Every case on certiorari to remove interlocutory proceedings of subordinate courts, tribunals or magistrates, may be brought to a hearing by either party, at any special term, upon the usual notice of argument; or if placed upon the calendar at a general term, every such case shall be entitled to preference on the morning of any day during the first week of term.

Law rule, 74.

RULE 43. [46.]

Rule may be entered to plead, on return to mandamus.

The return to a writ of mandamus or of prohibition, where such return shall be adopted by the party, having been filed, a rule may be entered requiring the relator to demur or plead thereto in twenty days after notice of said rule, or to move at the next special term thereafter, for such rule as he may require; and in case of default, on

In case of default,

writ dismissed.

filing an affidavit showing such default, a rule may be entered dismissing such writ and all subsequent proceedings, with costs.

Law rule, 75.

RULE 44. [47.]

When order to stay with view to change venue granted.

Effect of order.

When it may be revoked.

Notice of revocation to be given.

No order to stay proceedings for the purpose of moving to change the place of trial shall be granted, unless it shall appear, from the papers, that the defendant has used due diligence in preparing the motion for the earliest practicable day after *issue joined.* Such order shall not stay the plaintiff *from taking any* step except giving notice and subpœnaing witnesses for the trial, without a special clause to that effect. On presenting to and filing with the officer granting the order, an affidavit showing such facts as will entitle the plaintiff, according to the settled practice of the court, to retain the place of trial, the officer shall revoke the order to stay proceedings; and the plaintiff shall give immediate notice of such revocation to the defendant's attorney.

Law rule, 88. 4 Hill, 62 to 69, note. Id., 536. Id., 540. 6 Hill, 390. Code, §§ 123 to 127. By the recent revision, these motions can now only be made after issue joined. This settles the practice in accordance with the preponderance of cases cited in Pleadings and Practice, pp. 320, 321—i. e., 4 How., 86; 2 C. R., 78; 3 How., 71; 4 How., 409; 3 C. R., 106; 5 How., 135—overruling 4 How., 81; id., 246; 3 C. R., 24; id., 240. See the subject fully treated in the same work, chap. 3, book 7, p. 319 to p. 326.

N. B. This proceeding must not be confounded with the change of venue under § 126 of the Code. Vide Pleadings and Practice, pp. 233 to 236. See recent case, 6 How., 481.

RULE 45. [48.]

Affidavits for change of venue.

In addition to what has usually been stated in affidavits concerning venue, either party may state the nature of the controversy, and show how his witnesses are material; and may also show where the cause of action or the defense, or both of them, arose; and those facts will be taken into consideration by the court in fixing the place for trial.

See references in note to rule 44.

RULE 46. [49.]

If, in an action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff as stated in the complaint is admitted by the answer, the plaintiff may have an order referring it to the clerk, or to some suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If the defendant is an infant and has put in the general answer by his guardian, or if any of the defendants are absentees, the order of reference shall also direct the person to whom it is referred, to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale.

Order of reference to compute amount due on mortgage.

In what cases proof to be taken.

Where no answer is put in by the defendant, within the time allowed for that purpose, or any answer denying any material facts of the complaint, the plaintiff, after the cause is in readiness for trial, as to all the defendants, may apply for judgment, at any special term, upon due notice to such of the defendants as have appeared in the action, and without putting the cause on the calendar. The plaintiff, in such case, when he moves for judgment, must show by affidavit, or otherwise, whether any of the defendants who have not appeared are absentees; and if so, he must produce the report as to the proof of the facts and circumstances, stated in the complaint, and of the examination of the plaintiff or his agent on oath as to any payments which have been made. And in all foreclosure cases the plaintiff, when he moves for judgment, must show by affi-

Application for judgment at a special term.

Proof of filing no-

tice of lis pendens.

davit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action containing the names of the parties thereto, the object of the action and a description of the property in that county affected thereby, the date of the mortgage, and the time and place of recording the same, has been filed at least twenty days before such application for judgment, as required by § 132 of the Code of Procedure.

Equity rule, 91. Code, §§ 130, 132, 246. 3 How. Pr. R., 158, 159, 168. 1 Code Rep., 68.

In computing the amount due on a mortgage, the referee is not authorized to allow the plaintiff the amount of a premium paid for an insurance of the mortgaged premises, unless it was paid by an express agreement of the mortgagor or owner of the equity of redemption. But the referee may allow the mortgagee for taxes paid by him which were a lien on the mortgaged premises. Faure vs. Winans, Hopk. Rep., 283.

Where a defendant, by his answer, contests the plaintiff's claim to priority of payment out of the mortgaged premises, the referee, upon an ordinary reference under the rule, is not authorized to settle the question of priority between the parties. Harris vs. Fly, 7 Paige, 421. Sed vide, 3 How. Pr. R., 110.

Requisites of affidavit to obtain reference to compute amount due. 3 How. Pr. R., 158. Duty of referee explained; id., 159. See Pleadings and Practice, 455, 456, 476, 477.

RULE 47. [50.]

Form of judgment for sale of mortgaged premises.

In every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far at least as the same can be ascertained from the mortgage, shall be inserted. And, unless otherwise specially ordered by the court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff, for principal, interest and costs, and which may be sold separately without material injury to the parties interested, be sold by, or under the direction of the sheriff of the county, or a referee, and that the plaintiff, or any other party, may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that out of the proceeds of the sale, he pay to the plaintiff, or his attorney, the amount of his debt, interests and costs, or so much as the purchase money will pay of the same, and that he take the receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of

sale; and that the purchaser at such sale be let into possession of the premises on production of the deed. In case of a surplus arising from the sale of mortgaged premises under any such judgment, the sheriff or referee shall retain such surplus, subject to the order of the court, unless directions are given in the judgment for the disposition of such surplus.

In the city of New-York the sheriff or referee shall deposit such surplus with the chamberlain of the city, or, when so directed by the court, with the clerk of the court, within five days after such surplus shall have been received and shall be ascertainable.

Equity rule, 92. Session Laws of 1847, p. 344; 2 R. S., 192, §§ 157, 158; 3 How. Pr. R., 110, 178, 206, 280.

A prior mortgagee will be restrained by injunction from proceeding with a statute foreclosure, instituted after a foreclosure commenced in equity by a junior mortgage upon the same premises, where the prior mortgagee is made a party defendant in the latter proceedings. 3 How. Pr. Rep., 65.

Although in ordinary cases, sales under decrees of foreclosure are to be conducted by the sheriff, yet under the 77th section of the judiciary act, the court have the power, whenever it shall be deemed proper, to appoint a suitable person to make the sale, instead of the sheriff. 3 How. Pr. Rep., 130. See Practice and Pleadings, p. 474, 480, 481, 807 to 811, and additions thereto.

RULE 48. [51.]

Claimant may apply for surplus money.

On *filing the* report of the sale, any party to the suit, or any person not a party, who had a lien on the mortgaged premises at the time of the sale, either by judgment or decree, upon filing with the clerk where the report of sale is filed, a notice stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference to ascertain and report the amount due to him or to any other person which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. Every party who appeared in the cause, or who shall have filed such notice with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice to attend on

Order of reference.

such reference, and to the usual notices of subsequent proceedings relative to such surplus. But if such claimant has not appeared or made his claim by an attorney of this court, the notice may be served by putting the same into the post office directed to the claimant at his place of residence as stated in the notice of his claim.

Equity rules, No. 93.
In an action for the foreclosure of a mortgage, the "proper county" for the place of trial is where the mortgaged premises are situated, although the money may be loaned, and the mortgage executed and delivered to the mortgagee in another county. 3 How. Pr. R., 325. Practice changed from that of 1849, under which "the coming in and confirmation" of the report was a prerequisite. Pleadings and Practice, p. 480, Addition. See there as to apparent abrogation of Supplementary Rule in first District, made 20th February, 1851.

RULE 49. [52.]

Mortgage must be filed or recorded before deed executed.

Whenever a sheriff or referee sells mortgaged premises, under a decree or order or judgment of the court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such mortgage in the office of the clerk, unless such mortgage has been duly proved or acknowledged, so as to entitle the same to be recorded; in which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded at full length in the county or counties where the lands so sold are situated, before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and if filed with the clerk, he shall enter in the minutes the filing of such mortgage, and the time of filing. But this rule shall not extend to any case where the mortgage appears by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.

Equity rules, No. 94.

RULE 50. [53.]

When sheriff to sell in parcels.

Where mortgaged premises or other real estate directed to be sold, consist of several distinct lots or parcels, which can be sold separately without diminishing the value thereof on such sale, it shall be the duty of the sheriff or other

person conducting the sale to sell the same in separate lots or parcels, unless otherwise specially directed by the court. But if the sheriff or other person is satisfied the property will produce a greater price if sold together than it will in separate lots or parcels, he may sell it together, unless otherwise directed in the order of sale.

Equity rule, 95.

RULE 51. [54.]

Where lands in the city of New-York are sold under a decree, order or judgment of any court, they shall be sold at public vendure, at the Merchant's Exchange, between twelve o'clock at noon and three in the afternoon, unless otherwise specially directed. The notice of the sale of lands lying in any of the cities of this state in which a daily paper is printed, except where a different notice is required by law, or by the order of the court, shall be published in one or more of the daily papers of that city for three weeks immediately previous to the time of sale, at least twice in each week. When lands in any other part of the state are directed to be sold at auction, notice of the sale shall be given for the same time, and in the same manner as is required by law on sales of real estate by sheriffs on execution.

Where lands to be sold in the city of New-York

Notice how published.

Equity rule, 96. 2 R. S., 326, § 27, 368, § 34.
Though not absolutely necessary, it is proper to insert briefly the title of the suit, in the notice of sale. Ray vs. Oliver, 6 Paige, 489.

RULE 52. [55.]

It shall be the duty of every attorney or officer of this court, to act as the guardian of any infant defendant in any suit or proceeding against him, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defence when necessary for the protection of the rights of

Duty of guardian ad litem.

the infant; and he shall be entitled to such compensation for his services, as the court may deem reasonable.

Equity rule, 97. Code, §§ 115, 116.
See on the subject of guardianship, and guardianship ad litem, Practice and Pleadings, chap. 4, book 8, pp. 110 to 117.

RULE 53. [56.]

Who may be appointed guardians ad litem.

No person shall be appointed guardian ad litem, either on the application of the infant or otherwise, unless he be the general guardian of such infant, or an attorney or other officer of this court who is fully competent to understand and protect the rights of the infant, and who has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person shall be appointed such guardian who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defence of the suit.

Equity rule, 99.
See Practice and Pleadings, as referred to in note to last rule. Id. p. 115. 6 How., 283.
The court will not appoint a guardian ad litem for an infant defendant, upon the nomination of the complainant. Knickerbocker vs. De Freest, 2 Paige, 304. Grant vs. Van Schoonhoven, 9 Paige, 225.

N. B. Rule 57, of 1849, enabling the entry of an order for the appointment of a guardian ad litem, as of course, has been stricken out altogether. The appointment must now be made by an order of the judge, obtained in the usual manner. Vide Practice and Pleadings, pp. 115, 116, 764, 765, Additions.

RULE 54. [58.]

Guardian not to receive property unless he has given security

No guardian ad litem, unless he has given security to the infant according to law, shall, as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the suit, except such costs and expenses as may be allowed by the court, to the guardian, out of the fund, or recovered by the infant in the suit. Neither shall the general guardian of an infant receive any part of the proceeds of a sale of real property belonging to such infant, sold under a decree, judgment or order of the court, until the guardian has given such further security

for the faithful discharge of his trust as the court may direct.

Equity rule, 101. Code, § 420.
See reference to Practice and Pleadings in note to Rule 52.

RULE 55. [59.]

Security required of general guardian.

The security to be given by the general guardian of an infant, shall be a bond in a penalty of double the amount of the personal estate of his ward and of the gross amount or value of the rents and profits of the real estate during his minority, together with at least two sufficient sureties, each of whom shall be worth the amount specified in the penalty of the bond over and above all debts; or instead of personal security, the guardian may give security by way of mortgage on unincumbered real property of the value of the penalty of his own bond only. But the court, in its discretion, may vary the security where, from special circumstances, it may be found for the interest of the infant; and may direct the principal of the estate, or any part thereof, to be invested in public stocks or with the New-York Life Insurance and Trust Company, or on bond and mortgage, for the benefit of the infant, and that the interest or income thereof, only, be received by the guardian.

Equity rule, 102. Sess. Laws of 1830, p. 77.
See reference to Practice and Pleadings, as above.

RULE 56. [60.]

Certain moneys not to be paid to general guardian except on real security.

No moneys arising from the sale of the real estate of an infant, on a mortgage or partition sale, or under any decree, judgment or order of court, shall be paid over to his general guardian, except so much thereof, or of the interest or income from time to time, as may be necessary for his support or maintenance; unless such guardian has previously given sufficient security on unincumbered real estate, to account to the infant for the same, in the usual form.

Equity rule, 103. 2 R. S., 327, § 64. Code, § 420.
See reference to Practice and Pleadings, as above.

RULE 57. [61.]

How general guardian may be appointed.

For the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upwards, or some relative or friend if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which such person bears to the infant, and the nature, situation and value of the infant's estate.

Equity rule, 104. 1 R. S., 718. 2 R. S., 150, § 6.
See reference to Practice and Pleadings, as above.

RULE 58. [62.]

Court may ascertain age of infant by inspection and examination.

Upon presenting the petition, the court shall by inspection or otherwise ascertain the age of the infant, and if of the age of fourteen years or upwards, shall examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount or value of the rents and profits of the real estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian.

Equity rule, 105. Hopk. Rep., 226. 9 Paige, 202.
See reference to Practice and Pleadings, as above.

RULE 59. [63.]

Security required of special guardian.

The security required on a sale of the real estate of an infant, shall be a bond of the guardian, with two sufficient sureties, in a penalty of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond, over and above all debts; or a similar bond of the guardian only, secured by a mortgage on un-

incumbered real estate of the value of the penalty of such bond.

Equity rule, 106. 2 R. S., 194, § 170.
A husband can not be appointed guardian to sell the estate of his infant wife. 4 John. C. R., 378. A third person may be appointed, with the consent of the husband, to join with him in the sale. 3 Paige, 265. The general guardian, if there is one, is the proper person, unless some sufficient reason is shown for substituting another. 2 Paige, 412.
See reference to Practice and Pleadings, as above. Vide 4 How. 414.

RULE 60. [64.]

Application for appointment of special guardian.

An infant, by his general guardian, if he has any, and if there is none, *by* his next friend, may present a petition, stating the age and residence of the infant, the situation and value of his real and personal estate, the situation, value and annual income of the real estate proposed to be sold, and the particular reasons which render a sale of the premises necessary or proper; and praying that a guardian may be appointed to sell the same. The petition shall also state the name and residence of the person proposed as such guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given; and the petition shall be accompanied by affidavits of disinterested persons, or other proofs verifying the material facts and circumstances alleged in the petition. And if the infant is of the age of fourteen, he shall join in the application.

Equity rule, 107. 2 R. S., 194, § 170.
See reference to Practice and Pleadings, as above. Under rule of 1849, the general guardian might petition in his own name. Vide 8 Barb. S. C. R., 48.

RULE 61. [65.]

Reference ordered to ascertain truth of petition.

If it satisfactorily appears that there is reasonable ground for the application, an order may be entered appointing a guardian for the purposes of the application, on his executing and filing with the clerk, the requisite security, approved of as to its form and manner of execution by a justice of this court or a county judge, signified by his approbation endorsed thereon, and directing a reference to ascertain the truth of the facts stated in the petition, and

whether a sale of the premises, or any and what part thereof, would be beneficial to the infant, and the particular reasons therefor; and to ascertain the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold; and whether the infant is in absolute need of any and what part of the proceeds of the sale for his support and maintenance, over and above the income thereof, and his other property, together with what he might earn by his own exertions. And if there is any person entitled to dower in the premises, who is willing to join in the sale, also to ascertain the value of her life estate in the premises, on the principle of life annuities. But no proceedings shall be had upon such reference until the guardian produces a certificate to the clerk, that the requisite security has been duly proved, or acknowledged, and filed agreeably to the order of the court; and which certificate shall contain the name of the officer by whom it was approved, and shall be annexed to the report.

And value of dower.

Equity rule, 108. 2 R. S., 195, 196. 2 Paige, 409.
See reference to Practice and Pleadings, as above.

RULE 62. [66.]

When proceeds must be brought into court.

If the proceeds of the sale exceed five hundred dollars, and the guardian has not given security by mortgage upon real estate, he shall bring the proceeds into court, or invest the same under the direction of the court, for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof from time to time as may be necessary for the support and maintenance of the infant, without the order of the court. If the infant's interest in the property does not exceed one thousand dollars, the whole costs, including disbursements, shall not exceed twenty-five dollars. And where several infants are interested in the same premises as tenants in common, the application in behalf of all shall be joined in

the same petition, although they may have several general guardians; and there shall be but one reference to ascertain the propriety of a sale as to all, and but one bill of costs shall be allowed.

Equity rule, 109. 2 R. S., 195. 4 Paige, 44.
See reference to Practice and Pleadings, as above.

RULE 63. [67.]

Commissioners' fees on executing commission of lunacy.

On the execution of a commission of lunacy, &c., the commissioners, for every day they are necessarily employed in hearing the testimony and taking the inquisition, shall be entitled to the same allowance which is made by law to commissioners to make partition or admeasure dower. And for drawing the inquisition and process and serving notices, when no attorney is employed, they shall have the fees to which an attorney would be entitled for the same services.

When committee may pay taxed costs.

The committee of a lunatic, idiot, or drunkard, may pay to the petitioner on whose application the commission was issued, or to his attorney, the costs and expenses of the application and of the subsequent proceedings thereon, including the appointment of the committee, and without an order of the court for the payment thereof, when the bill of such costs and expenses has been duly taxed and filed with the clerk in whose office the appointment of such committee is entered; provided the whole amount of such costs and expenses does not exceed fifty dollars. But where the costs and expenses exceed fifty dollars, the committee shall not be at liberty to pay the same out of the estate in his hands, without a special order of the court directing such payment.

Equity rule, 110. 2 R. S., 648, § 85.
Costs will not be allowed to a plaintiff, who sues the committee of a lunatic by bill, when the right might have been settled on summary application to the court. 1 Barb. Ch. Rep., 49. Vide Practice and Pleadings, p. 87; 5 How., 109.

RULE 64. [68.]

Action for divorce or separation

When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, if the defendant fail to answer the complaint, or if the facts charged in the complaint are not denied in the answer, the court to which application is made for judgment shall order a reference to take proof of all the material facts charged in the complaint.

What averments in complaint for divorce.

And when the action is for a divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff—that five years have not elapsed since the discovery of the fact that such adultery had been committed—and that the plaintiff has not voluntarily cohabited with the defendant since such discovery—and also where at the time of the offence charged the defendant was living in adulterous intercourse with the person with whom the offence is alleged to have been committed—that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff; and the complaint containing such averments be verified by the oath of the plaintiff in the manner prescribed by the 157th section of the Code, judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced stating the above facts.

Equity rule, 111 and 112. 2 R. S., 144, § 84. Id., 145, § 88. 8 Wend., 357. 2 Paige, 454. 3 id., 387. 5 id., 554. 9 id., 25. 2 R. S., 144. Code, §§ 142, 246. 1 Barb. S. C. Rep., 313. 3 id., 236. 3 How. Pr. R., 242.

Upon a bill to annul a marriage on the ground of physical incapacity, the defendant, where the bill had been taken as confessed, was required to answer on oath before a master, as to the facts alleged in the bill, and to submit to such a personal examination as might be necessary to ascertain the existence of the alleged incapacity; and whether the same was incurable. Devanbagh vs. Devanbagh, 5 Paige, 554. Newell vs. Newell, 9 Paige, 25. Vide Practice and Pleadings, p. 314, 477. 1 C. R., 115. 4 How., 160.

RULE 65. [69.]

Order of reference,

To obtain an order of reference, if the complaint seeks to annul a marriage on the ground that the party was

how obtained in suit to annul marriage.

under the age of legal consent, an affidavit must be produced, showing that the parties thereto have not freely cohabited for any time, as husband and wife after the plaintiff had obtained the age of consent. If the complaint seeks to annul the marriage on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show by affidavit that there has been no voluntary cohabitation between the parties as man and wife; and if it seeks to annul a marriage on the ground that the plaintiff was a lunatic, an affidavit must be produced, showing that the lunacy still continues; or the plaintiff must show by his affidavit that the parties have not cohabited as husband and wife after the plaintiff was restored to his reason.

Equity rule, 113. 2 R. S., 142, 143. 1 Ed. Ch. R., 40.
See reference to Practice and Pleadings, as above, at rule 64.

RULE 66. [70.]

When plaintiff may be examined on reference.

On a reference to take proof of the facts charged in a complaint for separation, or limited divorce, the examination of the plaintiff on oath may be taken, as to any cruel or inhuman treatment alleged in the complaint which took place when no witnesses were present who are competent to testify to the facts on such reference.

Equity rule, 114. See reference to Practice and Pleadings, as above, at rule 64.

RULE 67. [71.]

Either party may apply for issues.

On a complaint for a divorce, or to avoid or annul a marriage contract for any other cause than physical incapacity, if the material allegations in the complaint are denied in the answer, and the plaintiff does not file a reply within the time allowed by the Code, the defendant, on due notice, may apply to have the complaint dismissed; but if a reply is put in, either party may, on the usual notice to the adverse party, apply for an order for issues.

Equity rule, 115. Code, § 72. 2 R. S., 145, 175. 2 Paige, 108.
See reference to Practice and Pleadings, as above, at rule 64.

RULE 68. [72.]

Defence in action for divorce.

The defendant in the answer may set up the adultery of the plaintiff or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the cause.

Equity rule, 116.
The defendant, in his answer, may deny the adultery charged in the bill, and may also, in the same manner, set up the adultery of the complainant, or a condonation of the offence, in bar of the suit. Wood vs. Wood, 2 Paige's Rep., 108.
And if the adultery of the husband is not discovered, or is not committed, until after the answer of the defendant has been put in, the court, upon a proper application, will permit the defendant to put in a supplemental answer, or to file a cross-bill, for the purpose of setting up such new defence. Smith vs. Smith, 4 id. 432.
See reference to Practice and Pleadings, as above, at rule 64.

RULE 69. [73.]

How husband may question legitimacy of children

On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation, that they are or that he believes them to be illegitimate, shall be distinctly made in the complaint. If a reference is ordered, proofs shall be taken upon the question of legitimacy, as well as upon the other matters stated in the complaint; and if an issue is awarded, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.

Equity rule, 117. Code, § 72. 2 R. S., 145.
See reference to Practice and Pleadings, as above, at rule 64.

RULE 70. [74.]

Manner of settling issues.

In cases where the trial of issues of fact is not provided for in § 253 of the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to settle the issues, and the court or judge may settle the issues, or may refer it to a referee to settle the issues. Such issues must be

settled in the form prescribed in § 72 of the Code of Procedure.

Equity rule, 59. 2 R. S., 180. Sess. Laws, 1839, p. 292. Code, §§ 72, 250. 8 Paige, 452. See Practice and Pleadings, pages 307, 308.

RULE 71. [75.]

No sentence or decree of nullity declaring void a marriage contract, or decree for a divorce, or for a separation or limited divorce, shall be made of course by the default of the defendant; or in consequence of any neglect to appear at the hearing of the cause, or by consent. And every such cause shall be heard after the trial of the issue, or upon the coming in of the proofs, at a special term of the court; but where no person appears on the part of the defendants, the details of the evidence in adultery causes shall not be read in public, but shall be submitted in open court. No officer of this court, with whom the proceedings in an adultery cause are filed, or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of the suit, shall permit a copy of any of the pleadings or testimony, or of the substance of the details thereof, to be taken by any other person than a party, or the attorney or counsel of a party, who has appeared in the cause, without a special order of the court.

No sentence of nullity or decree for divorce by default.

No copy of pleadings or testimony to be furnished except to the party or his counsel.

Equity rule, 118. 2 R. S., 144. Vide 4 How., 160.

RULE 72. [76.]

Whenever a justice, or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify, or if the security offered is by way of mortgage on real estate, to require proof of the value of such estate; and he shall in his certificate or report state the value of such real estate, or that each person offered as security is worth the requisite amount over and above all debts and responsibilities he owes or has incurred. And all bonds

Personal sureties to justify in all cases.

All securities to be proved or acknowledged.

and undertakings, and other securities in writing, shall be duly proved, or acknowledged in like manner as deeds of real estate, before the same shall be received or filed.

Equity rule, 120. 2 R. S., 406, § 74. Sess. Laws of 1838, p. 396.
The sureties in an appeal bond should be residents and householders, and should justify in double the amount. Eldridge vs. Howell, 2 Paige, 457.
If an appeal bond is not duly acknowledged or proved, as required by rule, the appeal is irregular, and may be dismissed. Ridabock vs. Levy, 8 Paige, 197.
Under rules of 1849, this rule was "not to apply to cases where the duty of the officer is prescribed by the Code of Procedure." This provision is now stricken out, and the rule becomes of general application. Vide Practice and Pleadings, p. 659, line 3, Additions. Vide 4 How., 414. See also Practice and Pleadings, pages 558, 659, 660.

RULE 73. [77.]

All lands held in common to be embraced in one suit for partition.

Where several tracts or parcels of land lying within this state are owned by the same persons in common, no separate action for the partition of a part thereof only shall be brought without the consent of all the parties interested therein; and if brought without such consent, the share of the plaintiff may be charged with the whole costs of the proceeding. And when infants are interested, the petition shall state whether or not the parties own any other lands in common.

Equity rule, 122. Code, §§ 306, 308.

RULE 74. [78.]

When reference as to title where there is no defence.

Where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a special term for an order of reference, to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the bill or petition; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held.

Equity rule, 124. 2 R. S., 321, § 23. Id., 330, § 82. 7 Paige, 89.
A proceeding for the partition of lands is an *action* within the definition contained in the Code. 3 How. Pr. R., 318. 1 Code Rep., 70. Contra, 3 How., Pr. R., 351.
When some of the defendants in a partition suit, do not answer within the time prescribed, it is unnecessary to enter an order for their default. 1 Code Rep., 67.
See Practice and Pleadings, pp. 456, 478, 719 to 721, 812. See recent case, 6 How., 491.

RULE 75. [79.]

Directions in order of reference where sale is necessary in partition.

Where the whole premises of which partition is sought, are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality, or where any lot, or separate parcel of the premises, which will exceed in value the share to which either of the tenants in common may be entitled is so circumstanced, the plaintiff, upon stating the fact in the affidavit which is to be filed for the purpose of obtaining an order of reference under the next preceding rule, may have a further provision inserted in such order of reference, directing the officer or person to whom it is referred, to inquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made; and that if he arrives at the conclusion that the sale of the whole premises or of any lot or separate parcel thereof will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and in such a case, that he also ascertain and report whether any creditor not a party to the suit, has a specific lien, by mortgage, devise or otherwise, upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to a general lien or incumbrance, by judgment or decree; and that he ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on

any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference. He shall also, if requested by the parties, who appear before him on such reference, ascertain and report the amount due to any creditor, not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser; to the end that such directions may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds thereof on such sale.

When referee to report incumbrances on the whole premises.

Equity rule, 125. 2 R. S., 330, 324. 5 Paige, 161.
In deciding whether a sale is necessary, the true question for the consideration of the referee, is whether the aggregate value of the several parcels into which the whole premises will be divided, will, when distributed among the different parties, in severalty, be materially less than the value of the same property if owned by one person. Clason vs. Clason, 6 Paige, 541.
See references to Practice and Pleadings given in note to last rule.

RULE 76. [80.]

How gross sum, in payment of life estates to be ascertained.

Whenever a party, as a tenant for life, or by the courtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum and of receiving and paying over the interest or income thereof; but if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of six per cent on the principal sum during the probable life of such person, according to the Portsmouth or Northampton tables.

Equity rule, 127. 2 R. S., 325, §§ 52, 68. See Northampton Table annexed.
For rule to compute the present value of an inchoate, or contingent right of dower, vide Jackson vs. Edwards, 7 Paige, 408, and the tables there referred to.
See references to Practice and Pleadings, as above. Vide 8 Barb., 618.

RULE 77. [81.]

Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor, without the special order of the court, until after a judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.

Powers and duties of receiver

When allowed his costs.

May sell doubtful claims at auction.

Equity rule, 134. Sees. Laws of 1845, p. 78. Code, §§ 111, 244, 298. 11 Paige, 590. Id., 200. 6 Paige, 29. Practice and Pleadings, chap. 5, book 18, pages 704 to 709. 4 Comst., 337. 5 How., 441. 9 L. O., 307. 1 C. R. N. S., 144. 5 How., 446. 6 How., 215. 8 Sandf., 678. 8 C. R., 157. See likewise Practice and Pleadings, pp. 526, 527; 4 How., 28; 5 How., 29; 1 C. R. N. S., 324; 4 Sandf., 694, as to receivership under proceedings supplementary to execution.

RULE 78. [82.]

On appeal to this court from the order, sentence or decree of a surrogate's court, the party appealing shall file a petition of appeal, addressed to this court, with the clerk

Appeals from surrogates, how made.

of the county in which the order, sentence or decree appealed from was made, within fifteen days after the appeal is entered in the court below, or the appeal shall be considered as waived; and any party interested in the proceedings in the court below may thereupon apply to this court, ex parte, to dismiss the appeal with costs. The petition of appeal shall briefly state the general nature of the proceedings, and of the sentence, order or decree appealed from, and shall specify the part or parts thereof complained of as erroneous; except where the whole sentence, order or decree is alleged to be erroneous, in which case it shall be sufficient to state that the same and every part thereof is erroneous. And where the appeal is from a sentence or decree, on the settlement of the accounts of an executor, administrator, or gurdian, if the appellant wishes to review the decision as to the allowance or rejection of any particular items of the account, such items shall be specified in the petition of appeal; or the allowance or disallowance of any such items shall not be considered a sufficient ground for reversing or modifying the sentence or decree appealed from. The respondent, in his answer to the petition of appeal in such cases, may also specify any items in the account as to which he supposes the sentence or decree is erroneous, as against him and in favor of the appellant. And upon the hearing of the parties upon such appeal, the sentence or decree may be modified as to any such items, in the same manner as if a cross-appeal had been brought by such respondent. The appellant may have an order of course, that the respondent in the petition of appeal answer the same within twenty days after the service of a copy of the petition of appeal and notice of the order, or that the appellant be heard ex parte. And where the respondent is an adult, upon filing an affidavit of such service upon the attorney of the respondent, if he has appeared either in this court, or in the court below by an attorney of this court, or upon the surrogate if he has

What the petition shall contain.

On the settlement of accounts.

What answer may state.

Order to answer petition.

not appeared by such attorney, and that no answer to the petition of appeal has been received, the appellant may have an order of course that the appeal be heard ex parte as against such respondent. Where the respondent is a minor, if he does not procure a guardian ad litem upon the appeal to be appointed within twenty days after the filing of the petition of appeal, the appellant may apply to a justice of this court, ex parte, for the appointment of such guardian. And if the minor has appeared by his guardian ad litem in this court, the appellant may have an order of course that the guardian ad litem of the respondent answer the petition of appeal within twenty days after service of a copy thereof and notice of the order, or that an attachment issue against such guardian. When a petition of appeal is filed, if it has not been served on the adverse party, the respondent may have an order of course that the appellant deliver a copy of the petition of appeal to the attorney, or to the guardian ad litem of the respondent, within ten days after the service of notice of such order, or that the appeal be dismissed; and if the same is not delivered within the time limited by such order, the respondent, upon due notice to the adverse party, may apply at a special term to dismiss the appeal with costs. Upon the hearing of any such appeal as is referred to in this rule, it shall be the duty of the appellant to furnish the court with a copy of the petition of appeal and of the answer thereto, if an answer has been received, and a copy of the proceedings below, including a copy of the appeal as entered.

How guar lian ad litem may be appointed.

Order to deliver copy of petition of appeal.

Appellant to furnish papers on hearing.

Equity rule, 83. 2 R. S., 611. Code, § 471.

The appellate court can not relieve a party, who has neglected to enter an appeal within the time limited by statute. 3 Paige, 189.

If the decree of the surrogate is affirmed on appeal, the appellate court may retain the cause, and award execution on the decree of affirmance. 3 Paige, 182.

An application to dismiss an appeal must be made on notice. 7 Paige, 419.

The petition of appeal should name the persons intended to be made respondents, and should pray that they may answer the same. 4 Paige, 102; 5 id., 170; 9 id. 66.

Vide 4 How., 129. 2 C. R., 69. 6 How, 318. 4 How., 439. See also recent case, 10 Barb. S. C. R., 309. Vide also id., 523, though not directly bearing on the question of appeal.

RULE 79. [83.]

All moneys brought into court to be paid to county treasurer.

All moneys brought into court by order of this, or any other court, shall be paid to the county treasurer of the county in which the action is triable, unless the court shall otherwise direct. And all bonds, mortgages and other securities upon real estate, heretofore required to be taken in the name of the clerk of the court of appeals, shall, except as otherwise provided by law, be taken to the treasurer of the county where such fund belongs, or such other county treasurer as this court shall direct. And all moneys received by the county treasurer, under and by virtue of any law, vesting him with the funds, or securities belonging to any of the suitors, in any court of this state, shall be deposited by the said county treasurer, in his name of office, in the New-York Life Insurance and Trust Company, or in such bank as the court for the district shall from time to time direct as a deposit bank, unless the order or judgment, under which such moneys are brought into court, shall direct such moneys to be deposited in some other bank, or company.

Where to be deposited.

Equity rule, 143. Sess. Laws of 1848, p. 404. The chamberlain of the city of New-York is the county treasurer thereof. 1 R. S., 870.

RULE 80. [84.]

How accounts of county treasurer shall be kept.

The accounts of the county treasurers with respect to moneys or securities, received by them under the foregoing rule, or by virtue of any order of any court of this state with the banks and other companies, in which moneys are directed to be deposited, shall be kept in such manner, that in the cash books of the banks and other companies, and in the bank books of the said treasurers, it shall appear in what particular suit, or on what account the several items of money credited, or charged, were deposited, or paid out.

To make an annual report.

The said county treasurer shall, at the first general term of this court, for the district in which such treasurer resides, in

each year, make a report to said court, containing a statement of his accounts, and of the funds and securities under his control, on the first day of January, which statement shall show the amount in his hands, uninvested, and the times when received, and the suit or matter in which the same was paid in, constituting the balance in deposit in banks, and other companies; and also all stocks, bonds and mortgages and other investments, for the benefit of suitors or otherwise. The court to which such report shall be made, shall cause the same to be examined by some suitable and proper person, to be appointed by them. The person so appointed shall forthwith proceed to examine the account and statement, with the accounts in banks and in other companies, and with the accounts and securities in the office of such treasurer. He shall have the power to summon witnesses before him, if necessary, to be examined with respect to such accounts. He shall report whether such accounts have been correctly kept, and are truly stated; and shall, on or before the first day of the next ensuing general term, in such district, deliver to the court of such district, by which he shall be appointed, or one of the justices thereof, his report upon the matters so referred.

Reference to examine his accounts

Equity rule, 144.

RULE 81. [85.]

Orders upon the banks or other companies for the payment of moneys out of court, shall be made payable to the order of the person entitled thereto, or of his attorney duly authorized, and shall specify in what particular suit or on what account the money is to be paid out, and the time when the order authorizing such payment was made. When moneys are deposited in the New-York Life Insurance and Trust Company to the credit of the county treasurer, the entry of such deposit, both in the books of the company and in the accounts of the county treasurer with the company, shall contain a short reference to the title of

Orders for moneys to be paid out of court, how drawn.

Accounts with the Trust Co., how kept.

the cause or matter in which such deposit is directed to be made; and specifying also the time from which the interest or accumulation on such deposit is to commence, where it does not commence from the date of such deposit.

Annual statement of account required.

The secretary of the company shall transmit to the justices holding the first general term, for the first district, in January in each year, a statement of the accounts of the said county treasurer; and to the justices holding the first general term, in the other districts, a statement of the accounts of the county treasurer in each district; showing the amounts standing to his credit on the first day of January, including the interest, or accumulation on the sums deposited to the credit of each cause or matter. In every draft upon the Trust Company by the county treasurer, for moneys deposited with the said company, or for the interest or accumulation on such moneys, the title of the cause or matter on account of which the draft is made, and the date of the order authorizing such draft, shall be stated; and the draft shall be made payable to the order of the person or persons entitled to the money, or of his or their attorney who is named in the order of the court authorizing such draft. And to authorize the payee or endorsee of such draft to receive the money thereon from the Trust Company, the same shall be accompanied by a certified copy of the order of the court authorizing such draft, countersigned by the justice by whom such order was made. But where periodical payments are directed to be made out of a fund deposited with such company, the delivery to the secretary of the company of one copy of the order authorizing the several payments, shall be sufficient to authorize the payment of subsequent drafts in pursuance of such order.

Orders to be countersigned by justice.

Equity rule, 145. 2 R. S., 171.

RULE 82. [86.]

Additional allowances to be applied for to the court giving the judgment.

Applications for an additional allowance under the provisions of the 308th section of the Code of Procedure, can only be made to the court before which the trial is had, or the judgment rendered.

1 Code Rep., 51; id., 81. 3 How. Pr. R., 328. 4 id., 65; id., 71.
See Practice and Pleadings, p. 619 to 627, and numerous cases there cited. See, in particular, 4 How., 71. 2 C. R., 47. 2 C. R., 80. 5 How., 121. 6 How., 235. 1 C. R. N. S., 382. 4 How., 252. 3 C. R., 21. 4 How., 185. 2 C. R., 107. 5 How., 278. 5 How., 153. 6 How., 11. 1 C. R. N. S., 178. 2 Comst., 570. 4 How., 208. 2 C. R., 130. 5 How., 242. 3 Sandf., 755. 1 C. R. N. S., 214. Vide also, 6 How., 453.

RULE 83. [87.]

Where an order has been refused, or granted upon terms, no subsequent application to another justice.

If any application for an order be made to any justice of this court, and such order be refused in whole or in part, or be granted conditionally, or on terms, no subsequent application, upon the same state of facts, shall be made to any other justice; and if, upon such subsequent application any order be made, it shall be revoked.

3 How. Pr. R., 90, 183. 1 Code Rep., 96. Vide Practice and Pleadings, p. 149.

N. B. Rule 88, of 1849, containing a prohibition against judges of the court acting as referees, has been stricken out on the recent revision. Vide Practice and Pleadings, p. 399, Addition.

RULE 84. [89.]

Bail to justify in county where defendant was arrested or the bail reside.

Whenever bail are required to justify, they shall justify within the county where the defendant shall have been arrested, or where the bail reside.

Code, § 198, 194, 195, 196. See Practice and Pleadings, p. 659, 660. 1 C. R., 69. 4 Comst., 161. 1 C. R. N. S., 266.

RULE 85. [90.]

Form of affidavit of serving summons, &c., when not done by sheriff.

Where the service of the summons, and of the complaint, or notice, if any, accompanying the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service when, and at what particular place, he served the

same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein, and also to state, in his affidavit, whether he left with the defendant such copy, as well as delivered it to him.

See Practice and Pleadings, pp. 108, 759. Code, § 138.

RULE 86. [91.]

Where judgment on failure to answer may be applied for

When the plaintiff in the action is entitled to judgment, upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the court, such application may be made at any special term, in the district embracing the county in which the action is triable, or in an adjoining county; such application may also be made at a circuit court in the county in which the action is triable. But when a reference, or writ of inquiry shall be ordered, the same shall be executed in the county in which the action is triable.

See Practice and Pleadings, 453 to 455. 1 C. R., 82. 5 How., 247. 3 C. R., 241. 6 How., 21. 1 C. R. N. S., 185. 3 How., 292. 1 C. R., 68. 3 C. R., 21. 5 How., 155. 3 C. R., 190. 1 C. R., 87. 6 L. O., 368.

RULE 87. [New.]

Separate causes of action or grounds of defence to be numbered.

In all cases of more than one distinct cause of action, defence, counter-claim or reply, the same shall not only be separately stated, but plainly numbered.

This provision is new. The practice had, however, become general before. Vide Practice and Pleadings, pp. 193, 194, 246, 252, 275, 293, Additions, Vide 6 How., 298. 4 How., 226. 2 C. R., 75. 6 How., 420.

RULE 88. [New.]

Application for justice to amend his return on appeal.

On appeals from a justice's judgment, where the county court has not jurisdiction, by reason of relationship, &c., a notice of motion for an order to compel the justice to amend his return may be given in twenty days after the date of the certificate of the county judge, and not after that time.

Vide Practice and Pleadings, p. 539, Addition.

RULE 89. [New.]

The sheriff shall file with the clerk the affidavits on which an arrest is made, within ten eays after the arrest. Affidavits on arrest to be filed.

Vide Practice and Pleadings, pp. 658, 659, 661, Additions.

RULE 90. [92.]

All actions depending on the first day of July, 1848, may be conducted according to the rules of the supreme court adopted in July, 1847, so far as the same are applicable. Practice in actions commenced before 1st July, 1848.

In cases where no provision is made by statute, or by these rules, the proceedings shall be according to the customary practice, as it has heretofore existed in the court of chancery and supreme court, in cases not provided for by statute, or the written rules of the court. In cases not provided for by statute or these rules

These rules shall take effect on the first day of October, 1852. Time when these rules take effect.

Law rule, 108. Equity rule, 148. Code, §§ 469, 470, 471. Sess. Laws of 1849, p. 705. Vide Practice and Pleadings, book 15.

ANNUITY TABLE.

A table corresponding with the Northampton tables referred to in the 76th rule, showing the value of an annuity of one dollar, at six per cent, on a single life, at any age from one year to ninety-four inclusive.

Age.	No. of years purch'se the annuity is worth.	Age.	No. of years purch'se the annuity is worth.	Age.	No. of y'rs purchase the annuity is worth.	Age.	No. of years purch'se the annuity is worth.
1	10.107	25	12.063	49	9.563	73	4.781
2	11.724	26	11.992	50	9.417	74	4.565
3	12.348	27	11.917	51	9.273	75	4.354
4	12.769	28	11.841	52	9.129	76	4.154
5	12.962	29	11.763	53	8.980	77	3.952
6	13.156	30	11.682	54	8.827	78	3.742
7	13.275	31	11.598	55	8.670	79	3.514
8	13.337	32	11.512	56	8.509	80	3.281
9	13.335	33	11.423	57	8.343	81	3.156
10	13.285	34	11.331	58	8.173	82	2.926
11	13.212	35	11.236	59	7.999	83	2.713
12	13.130	36	11.137	60	7.820	84	2.551
13	13.044	37	11.035	61	7.637	85	2.402
14	12.953	38	10.929	62	7.449	86	2.266
15	12.857	39	10.819	63	7.253	87	2.138
16	12.755	40	10.705	64	7.052	88	2.031
17	12.655	41	10.589	65	6.841	89	1.882
18	12.562	42	10.473	66	6.625	90	1.689
19	12.477	43	10.356	67	6.405	91	1.422
20	12.398	44	10.235	68	6.179	92	1.136
21	12.329	45	10.110	69	5.949	93	806
22	12.265	46	9.980	70	5.716	94	518
23	12.200	47	9.846	71	5.479		
24	12.132	48	9.707	72	5.241		

RULE FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY.

Calculate the interest at six per cent for one year, upon the sum to the income of which the person is entitled. Multiply this interest by the number of years purchase set opposite the person's age in the table, and the product is the gross value of the life estate of such person in said sum.

EXAMPLES.

Suppose a widow's age is 37; and she is entitled to dower in real estate, worth $350.75. One-third of this is $116,91⅔. Interest on $116.91, one year at six per cent (as fixed by 76th rule), is $7.01. The number of years purchase which an annuity of one dollar is worth, at the age of 37, as appears by the table, is 11 years, and $\frac{35}{1000}$ parts of a year, which multiplied by $7.01, the income for one year, gives $77.35, and a fraction, as the gross value of her right of dower.

Suppose a man whose age is 50, is tenant by the courtesy in the whole of an estate worth $9,000. The annual interest on the sum, at six per cent is $540.00. The number of years' purchase which an annuity of one dollar is worth, at the age of 50, as per table, is 9$\frac{417}{1000}$ parts of a year, which multiplied by $540, the value of one year, gives $5,085.18 as the gross value of his life estate in the premises, or the proceeds thereof.

NOTE.—The values in this table are calculated on the supposition that the annuities are payable yearly; if payable half yearly, one-fifth of a year's purchase should be added to those values.

For the rule to compute the present value of an inchoate or contingent right of dower, vide Jackson vs. Edwards, 7 Paige, 408. McKean's Pr. L. Tables, 25, § 4. Hendry's Ann. Tables, 87, Prob. 4.

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Mountjoy Square, Dublin, June 24, 1847.

To Hon. J. Bouvier.

Extract of a letter from the late Hon. Archibald Randall, Judge of the District Court of the United States for the Eastern District of Pennsylvania.

Dear Sir—I have delayed noticing the second edition of your Law Dictionary, until I could have an opportunity carefully to examine its contents. After such an examination I have no hesitation in recommending it to the Profession generally, and specially to those of limited libraries, as one of the most useful works of the kind in print.

Cambridge, Sept. 28, 1839.

DEAR SIR—I have the pleasure to acknowledge the receipt of your letter of the 19th instant. The sheets of your Law Dictionary, which you had the goodness to send to me, I received at the same time. I have examined them with considerable care, and do not hesitate to say that the work will be a very important and most useful addition to our Judicial literature. It supplies a defect in our libraries, where the small Dictionaries are so brief as to convey little information of an accurate nature to students, and the large ones are rather compendiums of the law, than explanatory statements of terms—yours has the great advantage of an intermediate character. It defines terms, and occasionally explains subjects so as to furnish students at once the means and the outlines of knowledge. I will feel myself greatly honored by the dedication of the work to me, although I am fully sensible there are many other gentlemen who have far better claims to such a distinction than myself. Believe me, dear sir, with the highest respect, truly your obliged friend,

The Honorable JUDGE BOUVIER. JOSEPH STORY.

Cambridge, January 7, 1840.

MY DEAR SIR—I had the pleasure a few days ago to receive the second volume of your Law Dictionary, for which I return you my very sincere thanks. The opinion which I formed of its great merit in examining the sheets which I formerly received of the first volume, is fully confirmed by an examination of the second. It is indeed, a most truly valuable work. I am gratified in having my name connected with your enterprise, and I trust you will receive from a liberal profession that full approbation and compensation which are so justly due to such useful labors. Professor Greenleaf and myself shall recommend it to the attention of all our Law Students. With the highest respect, truly your obliged friend, JOSEPH STORY.

The Honorable JUDGE BOUVIER.

New York, November 20, 1839.

DEAR SIR—I have the pleasure to acknowledge the receipt of your letter of the 30th ult., accompanied with the first volume of your "Law Dictionary," and for which I sincerely thank you.

I have not been insensible to the value of the gift, for I have run over almost every article in it, and beg leave to add, that I have been deeply impressed with the evidences, throughout the volume, of the industry, skill, learning, and judgment with which the work has been compiled. I have found it very instructive; and shall not fail to recommend its utility to the student, whenever a due opportunity occurs.

With my best wishes for your health, and for perseverance in your labors for the honor of the Profession. I am, respectfully and truly, yours, JAMES KENT.

Hon. JOHN BOUVIER.

Extract of a letter from the late Hon. HENRY BALDWIN, one of the Justices of the Supreme Court of the United States, to the author.

DEAR SIR—I thank you for the copy of your Law Dictionary, which you were kind enough to present to me, and shall preserve it as a pleasing proof of your friendship. I have too little time to examine the work throughout, but have read many parts of it attentively, and with much pleasure. You have bestowed upon it much labor in the collection of the matter, and shown great judgment in its arrangement and condensation, in which respects it is what such a work ought to be, a digest as well as a book of definitions. Such an one has long been wanting by the Profession, and, in my opinion, yours is not only the best which has been published, but is in itself a valuable acquisition to the bar and bench, by which both will profit.

Cambridge, December 17, 1839.

DEAR SIR—Your letter of October 30th, with the accompanying first volume of your Law Dictionary, did not reach me till this day. The second volume, from a source till now unknown, was received a few days ago. I had previously looked over those belonging to Mr. Justice Story. I pray you, dear sir, to accept my unfeigned thanks, not only for the books, which will be highly prized, but for having made so valuable an addition to our professional apparatus. For extent of research, clearness of definitions and illustration, variety of matter, and exactness of learning, it is not surpassed by any in use, and, on every account, I think, is preferable to them all.

I am, dear sir, with sincere respect, your obedient servant, SIMON GREENLEAF.

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whenever the subject was of sufficient importance to require it. Upon an examination, however, it will be found that English precedents have not been overlooked; on the contrary, they have been cited whenever they were important, or when American authorities could not be found applicable to the case." It has already had a very large circulation, and has received the highest eulogiums from all who have seen it. To young lawyers it is peculiarly valuable, as it contains much of a practical nature not to be found elsewhere. Its method and copious index, which a member of the New York Bar pronounced the most complete of any he had ever seen, renders it of great value for reference. One gentleman informed the publisher, that he had searched his library, a large one, for two days, for the laws upon a subject which he found in the Institutes in a moment; and another, that the morning he purchased the work, he saved by it more than its cost. In the words of the Chief Justice of the United States, "the work is one of very great value. The general plan, and the order and arrangements of the subjects of which it treats, could not, I think, be improved. And I may say the same thing of the manner in which the plan is carried into execution, for every principle and rule is stated with brevity and perspicuity, and supported by its proper references." It is useless to say more, when the best legal minds in the courts have given it their sanction—to them we respectfully refer.

From Chief Justice Taney.

Baltimore, May 31, 1851.

Dear Sir—Accept my thanks for the proof sheets of the "Institutes of American Law," which you have been good enough to send me, and also for the letter which accompanied them. So far as I can judge of the work from the portions before me, it is one of *very great value*, and will undoubtedly attract public attention. The general plan, and the order and arrangements of the subjects of which it treats, could not, I think, be improved. And I may say the same thing of the manner in which the plan is carried into execution. For every principle and rule is stated with brevity and perspicuity and supported by the proper reference. After thus expressing my opinion of the work, I need not add that I shall feel much honored by having my name associated with it. And thanking you for the kind terms in which you are pleased to speak of me in your proposed dedication, I am, dear sir, with great respect, your obedient servant,

R. B. TANEY.

Hon. J. Bouvier, Philadelphia.

Baltimore, July 17, 1851.

Dear Sir—Accept my thanks for the volumes of the Institutes of American Law. My impressions in its favor, which I expressed in my former letter to you, have been strengthened by looking further into it, and I hope the work will meet with the attention and encouragement which it so well deserves. With great respect, I am your obedient servant,

R. B. TANEY.

Hon. J. Bouvier, Philadelphia.

From the Hon. Joel Jones, late President Judge of the District Court of the City and County of Philadelphia.

Philadelphia, October 11, 1851.

Robert E. Peterson, Esq.—Dear Sir—I have examined with as much care as my engagements would permit, the Institutes of American Law, by the Hon. John Bouvier.

I regard the work as a very valuable contribution to American Jurisprudence. The author's distribution and arrangement of subjects is unusually methodical and exact, and his manner of treating them elementary and concise. The work is enriched with copious references to the sources from which it has been derived, rendering it thereby useful to the experienced practitioner as well as to the student. The want of a work of this kind, has long been felt; and for myself, I feel free to acknowledge the obligation I am under to the learned author for the ability and industry with which he has supplied it. With much respect, I am your obedient servant,

JOEL JONES.

From the Hon. J. M. Read, formerly Attorney General of Pennsylvania, and late District Attorney of the United States.

Philadelphia, September 20, 1851.

Dear Sir—I perused a portion of the first volume of Judge Bouvier's Institutes of American Law, in sheets, and made some extracts from it, for use, upon a subject I was then engaged upon. Since then I have examined the whole four volumes, and can freely say, that it forms a valuable addition to legal science; and is well calculated to become a text book for students. The discussion of remedies, both in law and equity, is particularly full, and supplies what was either wholly or partially omitted by former commentators, and forms an admirable introduction to the larger treatises of Chitty, Greenleaf, Story, and Spence. Very respectfully yours,

JOHN M. READ.

Robert Peterson, Esq.

From the Hon. John McLean, one of the Associate Judges of the Supreme Court of the U. States.

Cincinnati, October 3, 1851.

Dear Sir—I am under very great obligations to you for Mr. Bouvier's "Institutes of American Law," which I have lately received. My engagements have been such, that I have been able only to look through the work, and to notice the general arrangement of the subjects embraced by it. The classification of the topics explained, appears to me to be lucid and natural; and I was struck with the excellent method of the work. The plan seems not to have been copied from any one, but it has more of the simplicity and manner of the civil law writers, than is found in the elementary treatises of the common law. The principles of law are succinctly and clearly stated, and illustrated, and the notes appended are judiciously selected, without being crowded, as they are in many of our modern publications.

I know of no work which shows so much research, and which embodies so generally the elementary principles of American Law, as the Institutes of Mr. Bouvier. His name is most favorably known to the profession, by his previous works; and I am greatly mistaken, if his Institutes shall not add to his high reputation as an able and learned law writer. The Institutes ought not only to be found in the hands of every student of law, but on the shelf of every lawyer. With great respect, your obliged and obedient servant,

JOHN McLEAN.

Robert E. Peterson, Esq.

From the Hon. JAMES M. WAYNE, one of the Associate Judges of the Supreme Court of the United States.

Savannah, November 4, 1851.

DEAR SIR—I was away from home when your first letter reached this place, and your second and first were only received on Saturday.

I am obliged to you for both, and very much so for Mr. Bouvier's Institutes of American Law. Present my respects to him if you please, with my congratulations upon his having given to the profession a work of so much merit and real ability.

I have given the two last days to the examination of it.

It has revived my recollection of several points with which I am not as familiar as I used to be, instructed me in others about which I was not as well informed before. I shall often have occasion to use it officially; and as a preliminary work for the teacher and student of Jurisprudence, I do not doubt that it will supply the want in every particular, indicated in the preface of the author. I am, dear sir, very respectfully your obedient servant, JAMES M. WAYNE.

ROBERT E. PETERSON, ESQ.

From the Hon. SIMON GREENLEAF, author of "Greenleaf on Evidence," etc.

Boston, 1851.

DEAR SIR—I have received the volumes of the "Institutes," of Judge Bouvier, which he had the kindness to send me, through you.

In this work the learned author has taken the middle course, not occupied, that I know of, by any preceding American writer; treating his subjects with a degree of learning, compactness, precision of statement, and accuracy of definition, that cannot fail, I think, of rendering it highly acceptable to the profession.

Judge Bouvier is so well known to the profession, that any commendation of his Institutes from me would be superfluous; but it will give me great pleasure to be instrumental in making them known, whenever opportunity may occur. With sincere thanks for your kind attention, I beg to remain your much obliged and obedient servant, S. GREENLEAF.

MR. ROB'T E. PETERSON.

The following extract is from a letter received by the late Judge Bouvier from the Hon. SIMON GREENLEAF.

"I beg you to accept my hearty thanks for the volumes of your "Institutes," which I yesterday received. I have rapidly looked them over, plunging into one or two titles in which my present studies are most occupied; and am quite delighted with the work. It will prove a very valuable and acceptable addition to our legal literature."

From the Hon. H. W. GREEN, Chief Justice of New Jersey.

Trenton, N. J., October 23, 1851.

DEAR SIR—I have devoted the first leisure moments at my command, since my return home, after an absence of several weeks, to an examination of the "Institutes of American Law." The volumes contain an admirable compend of legal principles. They will prove an acquisition to the student, and a valuable addition to the library of every lawyer. Most respectfully, your obedient servant, HENRY W. GREEN.

MR. ROBERT E. PETERSON.

From the Hon. ROBERT C. GRIER, one of the Associate Judges of the Supreme Court of the United States.

Philadelphia, October 15, 1851.

DEAR SIR—I must plead the absorbing nature of my official duties for some time past, as my apology for not sooner thanking you for the volumes of Mr. Bouvier's new work, "The Institutes of American Law." It requires but a glance at the volumes to see the very superior character of its typographical execution. It does honor to the Press of Philadelphia.

Of the contents of the volumes, I have had leisure only to give a cursory examination. The principles and definitions of the law, so far as I have observed, are stated with great accuracy and precision. The order and classification of the subjects, (a very important characteristic in such a work,) seem to me of the very best. The learned author appears to have fulfilled the promise of his preface, in giving a valuable "preliminary work to serve the young American student as a guide in the labyrinth of the law;" and "a general view to the several parts of judicial science in a method which should be adopted in the study of the law." Yours, etc., R. C. GRIER.

R. E. PETERSON, ESQ.

I have carefully examined Judge Bouvier's Institutes of American Law, and am satisfied that there are few elementary works of greater utility to the bench, the bar, and particularly to the student. I was forcibly struck with the excellence of the plan adopted, which gives a peculiar value to the work. The principles of law it embraces, are explained with simplicity and clearness, and supported as they are by the highest authorities, the work must be esteemed a valuable contribution to the science of law. THOMAS IRWIN,

District Judge of the United States Western District of Pennsylvania.

Pittsburgh, June 22, 1852.

From the Hon. J. K. KANE, Judge of the United States District Court for the Eastern District of Pennsylvania.

Rensselaer, near Philadelphia, October 10, 1851.

I have devoted some time to an examination of Judge Bouvier's Institutes. I have traced his analysis of the Law through its several subdivisions, and have also read several titles of the text; and I am satisfied that the work is worthy of its author's well established reputation, and that it must occupy a place in every well stocked professional library. Very respectfully, your most obedient servant, J. K. KANE.

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